Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

B. BOYKIN ROSE, ET. AL., PETITIONERS,

v.

PLANNED PARENTHOOD OF SOUTH CAROLINA;
RENEE CARTER, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fourth Circuit erroneously hold that plaintiffs have standing to pursue this action under the analysis set forth in *Lujan v. Defenders of Wildlife*, especially in view of the fact that it failed to address directly contrary decisions rendered by the Fifth and Eleventh Circuits?

2. Even assuming that plaintiffs have standing to maintain this action, did the Fourth Circuit nevertheless erroneously hold that the issuance of a "Choose Life" license plate violates plaintiffs' First Amendment rights even though the license plate constitutes government speech?

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

Petitioners: (1) **B. BOYKIN ROSE**, in his official capacity as the Director of the Department of Public Safety of the State of South Carolina;
(2) **JON E. OZMINT**, in his official capacity as the Director of the Department of Corrections of the State of South Carolina;
(3) **KIM S. AYDLETTE,** in her official capacity as the Director of the Department of Social Services of the State of South Carolina.

Respondents: All parties are identified in the case caption.

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The June 28, 2004 Order by the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and rehearing *en banc* filed by B. Boykin Rose, Jon E. Ozmint, and Kim S. Aydlette is reported at 373 F.3d 580 (4th Cir. 2004) and is reprinted at App. 1a-25a. The March 22, 2004 panel opinion by the Fourth Circuit is reported at 361 F.3d 786 (4th Cir. 2004) and is reprinted at App. 26a-63a. The December 26, 2002 Opinion and Order of the United States District Court for the District of South Carolina is reported at 236 F. Supp. 2d 564 (D.S.C. 2002) and is reprinted at App. 64a-94a.

STATEMENT OF JURISDICTION

The Fourth Circuit filed its Order denying the petition for rehearing and rehearing *en banc* on June 28, 2004. This petition for writ of certiorari is therefore timely pursuant to Supreme Court Rule 13 because it has been filed within 90 days of June 28, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the relationship between the First Amendment to the United States Constitution--as

it applies to the states through the Fourteenth Amendment[1]--and South Carolina Code Section 56-3-8910 (Law. Co-op. Supp. 2003).

The First Amendment to the United States Constitution states as follows in pertinent part:

"Congress shall make no law ... abridging the freedom of speech ...." U.S. Const., amend. I.

The Fourteenth Amendment to the United States Constitution states as follows in pertinent part:

"No State ... shall... deprive any person of life, liberty, or property, without due process of law ...." U.S. Const., amend. XIV, § 1.

South Carolina Code Section 56-3-8910 provides as follows:

> S.C. Code § 56-3-8910. "Choose Life" special license plates authorized.
>
> (A) The Department of Motor Vehicles shall issue special motor vehicle license plates to

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[1] *E.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996) (the First Amendment "applies to the states under the Due Process Clause of the Fourteenth Amendment").

owners of private passenger carrying motor vehicles or light pickups having an empty weight of seven thousand pounds or less and a gross weight of nine thousand pounds or less registered in their names which shall have imprinted on the plate the words "Choose Life". The fee for this special license plate is seventy dollars every two years in addition to the regular motor vehicle license fee set forth in Article 5. This special license plate must be of the same size and general design of regular motor vehicle license plates. The special license plates must be issued or revalidated for a biennial period which expires twenty-four months from the month they are issued.

(B) The fees collected pursuant to this section, after the costs to produce and administer the distribution of this special license plate, must be deposited in a special account, separate and apart from the general fund, designated for use by the Department of Social Services to be used to support local crisis pregnancy programs. Local private nonprofit tax exempt organizations offering crisis pregnancy services may apply for grants from this fund to further their tax exempt purposes. Grants must be awarded not more than once a year, and an applicant must receive as a grant an amount of the total revenues in the fund multiplied by the percentage that the applicant's case load in the preceding calendar year was of

the total case load of all applicants in that year. Grants may not be awarded to any agency, institution, or organization that provides, promotes, or refers for abortion.

(C) Before the Department of Motor Vehicles produces and distributes a special license plate pursuant to this section, it must receive four hundred prepaid applications for the special license plate or a deposit of four thousand dollars from the individual or organization seeking issuance of the license plate. If a deposit of four thousand dollars is made by an individual or organization pursuant to this section, the department must refund the four thousand dollars once an equivalent amount of license plate fees is collected for that organization's license plate. If the equivalent amount is not collected within four years of the first issuance of the license plate, the department shall retain the deposit.

(D) If the department receives less than three hundred biennial applications and renewals for the "Choose Life" special license plate, it may not produce additional special license plates in that series. However, the department shall continue to issue special license plates of that series until the existing inventory is exhausted.

STATEMENT OF THE CASE

I. Overview of the Case

A panel of the Fourth Circuit affirmed the ruling of the district court that plaintiffs Planned Parenthood of South Carolina and Renee Carter have standing to maintain a lawsuit challenging the constitutionality of a South Carolina statute authorizing a "Choose Life" license plate and that the statute represents an unconstitutional abridgment of the plaintiffs' First Amendment rights. Although Circuit Judge M. Blane Michael wrote an opinion affirming the decision of the district court, no other judge of the panel joined that opinion and each of the other panel judges issued their own opinion concurring only in the judgment. The Fourth Circuit subsequently denied the petition for rehearing *en banc* filed by defendants Rose, Ozmint, and Carter.

II. Background of the Case

In 2001, the Governor of South Carolina approved South Carolina Code Section 56-3-8910, which authorizes a license plate with the message "Choose Life." App. 29a. This statute establishes a $70 biennial fee in addition to the ordinary license fee for anyone purchasing a "Choose Life" plate. S.C. Code Ann. § 56-3-8910. Subsection (B) of the statute provides that the funds remaining from the sale of these plates after satisfaction of administrative costs are

"designated for use by the Department of Social Services to be used to support local crisis pregnancy programs." *Id.* § 56-3-8910(B). The statute expressly provides that "[g]rants may not be awarded to any agency, institution, or organization that provides, promotes, or refers for abortion." *Id.* The statute also conditions production of the plate on the receipt by the Department of Motor Vehicles ("DMV") of 400 prepaid applications for the plate or a $4,000 deposit. *Id.* § 56-3-8910(C). And, finally, the statute further directs that if fewer than 300 biennial renewal applications are received, the DMV may not produce additional plates in the same series. *Id.* § 56-3-8910(D).

Planned Parenthood at no time applied for a license plate pursuant to South Carolina Code Section 56-3-8000 (Law. Co-op. Supp. 2003), which allows non-profit organizations meeting certain requirements to obtain a special license plate for its members. App. 31a. Although section 56-3-8000 does not authorize individuals to obtain special license plates, the record contains no indication that Renee Carter made any alternative effort to seek a license plate. App. 36a. And, although a Planned Parenthood representative did claim during a legislative hearing on a similar bill that the legislature should provide for a pro-choice license plate if it authorized a "Choose Life" plate, that bill was not passed by the legislature. App. 31a.

III. The Proceedings Below

Shortly after the "Choose Life" statute went into effect, plaintiffs filed their initial Summons and Complaint in the United States District Court for the District of South Carolina seeking declaratory and injunctive relief against state officials "charged with administering the Choose Life license plate program and with distributing the proceeds from the sale of the plate." App. 32a; *see also* App. 70a. As pertinent to this matter, plaintiffs alleged in their First Cause of Action that the "Choose Life" statute constitutes viewpoint discrimination in violation of the First and Fourteenth Amendments. App. 31a, 81a. The parties ultimately filed cross-motions for summary judgment: plaintiffs moved for summary judgment on the merits of their First Cause of Action and defendants moved for summary judgment on the grounds that plaintiffs lack standing and that defendants are entitled to judgment on the merits of each claim. App. 71a. On December 26, 2002, the district court issued an Opinion and Order finding that plaintiffs have standing to maintain their First Amendment claims and that section 56-3-8910 constitutes impermissible viewpoint discrimination in violation of the United States Constitution. App. 90a-94a.

On appeal, the Fourth Circuit panel affirmed the judgment of the district court. App. 58a. However, it did so by a divided panel. Judge Michael announced the judgment of the panel affirming the district court and

wrote a separate opinion explaining why he concluded that the "Choose Life" statute is unconstitutional. App. 29a. The other members of the panel, Circuit Judges J. Michael Luttig and Roger L. Gregory, wrote separately to concur in the judgment; however, they did not join Judge Michael's opinion. App. 58a-61a (Luttig, J.); App. 61-63a (Gregory, J.).

Based on the three opinions issued on appeal, the panel concluded that the plaintiffs have standing to maintain this action. In doing so, they failed to consider or discuss cases in the Fifth and Eleventh Circuits holding that persons situated substantially the same as the plaintiffs in this case did not have standing. *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003); *Henderson v. Stalder*, 287 F.3d 374 (5th Cir.), *cert. denied*, 537 U.S. 1048 (2002); *see* App. 11a, n.3 (discussing failure to "reckon[] with contrary decisions from the Fifth and Eleventh Circuits") (Shedd, J., dissenting from denial of reh'g *en banc*). The panel also concluded that the "Choose Life" statute violates plaintiffs' First Amendment rights even though the statute itself does not contain any restrictions on plaintiffs' speech

The Fourth Circuit subsequently denied the petition for rehearing and rehearing *en banc* filed by defendants Rose, Ozmint, and Aydlette. App. 3a. However, Circuit Judge Dennis W. Shedd wrote an opinion joined by Circuit Judge Karen J. Williams

dissenting from the denial of rehearing *en banc*. App. 4a-25a.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 sets forth a series of reasons that this Court considers in determining whether to grant a writ of certiorari. Among these considerations is whether a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." This Court also will consider whether a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."

Both of these considerations are present in this case to a degree that warrants review by this Court. With respect to plaintiffs' standing to maintain their challenge to the "Choose Life" statute, the judgment by the Fourth Circuit conflicts with decisions rendered by other circuits. The Fifth and Eleventh Circuits have held that plaintiffs similarly situated to the plaintiffs in this action did not have standing to challenge "Choose Life" license plate statutes enacted by states within their respective circuits. The judgment of the Fourth Circuit failed to discuss or explain its reasons for concluding that standing exists in this case but not in the cases from other circuits. This conflict is important because there now is a dispute among the circuits regarding the

constitutional minimum requirements for standing as expressed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Aside from failing to properly consider these contrary decisions, the judgment of the Fourth Circuit also establishes a legal situation in which a single individual may effectively halt government programs to which he is opposed merely by claiming that he was given no affirmative opportunity to express a contrary viewpoint.

Furthermore, the judgment of the Fourth Circuit with respect to the substance of plaintiffs' case is an "important federal question that has not been, but should be, settled by this Court." Because a significant number of states have authorized a "Choose Life" license plate or have undertaken legislative action regarding such a plate,[2] the judgment implicitly

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[2]As of the date of this petition, Alabama, Arkansas, Connecticut, Florida, Hawaii, Louisiana, Maryland, Mississippi, Montana, Oklahoma, South Carolina, and Tennessee all have authorized a "Choose Life" license plate. Choose Life, Inc., *Newsletter* (last modified Aug. 3, 2004) <http://www.choose-life.org/newsletter.html>. California, Delaware, Georgia, Illinois, Kentucky, Michigan, New Hampshire, Ohio, Rhode Island, Texas, and Virginia have undertaken legislative action to some degree regarding a "Choose Life" license plate but, for various reasons, have not yet finally authorized issuance of the license plate. *See id.*

undermines the decisions of these states to issue a "Choose Life" plate.

Perhaps more importantly, this case calls into question the parameters of government speech as it has been gradually developed by this Court and by other circuits. To the extent there is any consensus between the members of the panel in this case, it appears the Fourth Circuit has concluded that even if a state wishes to communicate a particular message, it nevertheless must affirmatively provide for the expression of opposing viewpoints. This is an important issue because states routinely wish to communicate public policy issues based on their political judgment and, further, attempt to do so without diluting that message with contrary viewpoints. The judgment of the Fourth Circuit will require governments to be schizophrenic by always providing for an opposing viewpoint and, thus, narrowing or eliminating the effectiveness of their message. This, in turn, will require the federal court system to insert itself into the political decisions of 50 state governments in addition to the federal government.

Thus, whether a state may issue a "Choose Life" license plate is an issue to some degree in 23 states. Moreover, the panel judgment undermines the ability of states to issue any type of communicative license plate or, indeed, to make any communication. *See* App. 23a-25a.

I. Review Is Warranted Because the Judgment of the Fourth Circuit Is in Direct Conflict with Other Circuit Court Decisions on an Important Aspect of Federal Law.

Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because the doctrine of standing is constitutional in its origins, a party seeking to invoke the jurisdiction of a federal court first must establish the existence of three requirements as a predicate to successfully proceeding in federal court. *Id.* at 560-61. First, there must be an injury in fact. *Id.* This requirement is defined as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted) (citations omitted). Second, the plaintiff must establish a causal connection; *i.e.*, a showing that the alleged injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* at 560-61 (internal quotation marks omitted). And, third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).

In the panel judgment, the Fourth Circuit concluded that plaintiffs have standing because they

have made an allegation of discriminatory treatment. App. 34a-36a. That is, the Fourth Circuit found standing on the basis of plaintiffs' allegations that they are subjected to discriminatory treatment because they allegedly do not have the opportunity to express their viewpoint but that persons who are opposed to abortion have the opportunity to express theirs. In concluding that this allegation confers standing, the Fourth Circuit failed to consider the analysis of decisions in two other circuits holding that similarly situated plaintiffs did not have standing to challenge the "Choose Life" statute.[3]

In *Henderson v. Stalder*, 287 F.3d 374 (5th Cir.), *cert. denied*, 123 S. Ct. 602 (2002), the Fifth Circuit held that a plaintiff seeking invalidation of a "Choose Life" statute on the basis that they do not have the opportunity to express their viewpoint does not have standing. As the basis for its conclusion, the court

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[3]In his opinion dissenting from the denial of rehearing *en banc*, Judge Shedd noted that "[a]t the very least, the panel's standing analysis should have reckoned with contrary decisions from the Fifth and Eleventh Circuits in the only other federal appellate cases involving "Choose Life" license plates. Indeed, the Eleventh Circuit found standing lacking even where the plaintiffs had attempted, but failed, to obtain enactment of a statute authorizing pro-choice speciality plates. No such effort was made in this case." App. 11a, n.3.

observed that declaring the statute unconstitutional will not assist anyone in expressing a pro-choice point of view. Rather, it will "merely function to prevent other motor vehicle drivers from expressing their choose-life point of view." *Id.* at 381. In a concurring opinion, Circuit Judge Edith H. Jones observed that affording standing to plaintiffs who simply seek invalidation of a statute without also seeking an opportunity to express their own viewpoint "would transform the First Amendment into a device for censorship rather than the enhancement of free speech." *Id.* at 387.

Similarly, in *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (hereinafter "*WEN*"), the Eleventh Circuit rejected a claim of standing by a plaintiff seeking to strike down the Florida "Choose Life" statute on the basis that she did not have an opportunity to express her pro-choice viewpoint. As did the Fifth Circuit, the court held that the plaintiffs alleged relief would not redress her injury because "[r]emoving pro-life speech from the forum does not in any way advance Appellant's opportunity to speak." *Id.* at 947. The court also held that "the First Amendment does not require the state to facilitate Appellant's speech where they have not requested the opportunity to speak, and we will not instruct the state to exceed the requirements of the First Amendment." *Id.*

The decisions of the Fifth and Eleventh Circuits correctly consider issues that the Fourth Circuit overlooked and misapplied. Whereas the Fourth Circuit

found standing on the basis of an allegation of discriminatory treatment, both the Fifth and Eleventh Circuits rejected standing by similarly-situated plaintiffs because enactment of the "Choose Life" statute alone did not impair the plaintiffs' ability to speak and certainly did not establish a framework of expression as its pertains to license plates. *See WEN*, 323 F.3d at 947; *Henderson*, 287 F.3d at 381-82. In other words, the plaintiffs were not subjected to discriminatory treatment because the "Choose Life" statute addresses only the expression of that particular message. It does not restrict the expression of any other viewpoint, and does not create rules or regulations governing license plates in general. *See WEN*, 323 F.3d at 947-48. Consequently, the plaintiffs failed to allege a sufficient injury-in-fact because they were not injured in any manner by the object of their lawsuit: the "Choose Life" statute.

Furthermore, both the Fifth and Eleventh Circuits rejected the contention that invalidating the "Choose Life" statute would redress the plaintiffs' alleged injury. *WEN*, 323 F.3d at 947; *Henderson*, 287 F.3d at 381-82. Again, the Fourth Circuit concluded that striking down the statute would alleviate the alleged discriminatory treatment suffered by the plaintiffs in this case. App. 34a-36a, 38a. However, although facing precisely the same issues, the Fifth and Eleventh Circuits concluded that similarly situated plaintiffs did not have standing because the First Amendment did not require or permit closing the entire license plate forum merely on a claim

that one viewpoint was precluded from participating in the forum. *WEN*, 323 F.3d at 937-48; *Henderson*, 287 F.3d at 381-82. As Judge Jones noted in an analysis with which the Eleventh Circuit later agreed, enjoining speech based on these facts would transform the First Amendment into a device for censorship. *WEN*, 323 F.3d at 947-48; *Henderson*, 287 F.3d at 387.

The issue of standing is important in this case because it involves the question whether a person has standing to challenge a legislative enactment without making any substantial effort to seek expression of their opposing viewpoint. Plaintiff Renee Carter made no individual efforts to obtain any type of license plate for her personal use. *See* App. 36a. Planned Parenthood made no effort to apply for a license plate, *see* App. 32a, and the contention of a representative in a committee hearing is an insufficient request for a license plate, analogous to a newspaper editorial criticizing or proposing legislative action.[4] As the Eleventh Circuit noted, the First Amendment does not require that the government affirmatively create an

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[4]In this regard, the Fourth Circuit also failed to consider the Eleventh Circuit's conclusion that the plaintiffs in *Women's Emergency Network* did not have standing even though the Florida legislature had expressly rejected a legislative proposal that would have "created a pro-choice license plate." *WEN*, 323 F.3d at 947 n.12.

avenue of speech for those who have not sought it. *WEN*, 323 F.3d at 947. Yet, by its judgment, the Fourth Circuit at least implicitly requires the government to provide for the expression of alternative viewpoints without regard to whether anyone has requested the opportunity to express those viewpoints.

Moreover, should the government not anticipate and provide for these alternative viewpoints, the Fourth Circuit judgment also permits a single individual to halt the expression of certain viewpoints merely upon an allegation that they have not been provided with the opportunity to express an opposing viewpoint. Importantly, based on the facts of the case, the panel judgment apparently requires essentially no effort at all on the part by the person challenging the enabling statute. Simply an allegation is sufficient to claim standing and halt the communication of the speech. For instance, South Carolina--and many other states--has statutorily authorized license plates commemorating a variety of topics, such as plates concerning Saltwater Fishing, S.C. Code Ann. § 56-3-7300 (Law. Co-op. Supp. 2003), and Ducks Unlimited, *id.* § 56-3-8600. Based on the judgment of the Fourth Circuit, either of these plates could be challenged by a single individual opposed to hunting and fishing because the legislature did not at the same time provide for a license plate stating something to the effect of "Animals Have Rights, Too" or "Hunting and Fishing Are Wrong for Animals and Wrong for the State."

The legislature also has authorized license plates expressing "United We Stand," *Id.* § 56-3-9200 (providing that a portion of funds from sales of this plate must be deposited into a fund "created to establish rewards for the capture of terrorists"), and "God Bless America," *Id.* § 56-3-9500 (providing that funds from sales of this plate must be "designated for use by the South Carolina National Guard for homeland security"). The communication contained in any of these plates could be challenged by a single individual if he alleges a wish to communicate a different viewpoint. For example, someone might oppose the "United We Stand" license plate enacted following the terrorist attacks of September 11, 2001 because he believes that the President of the United States was complicit in the attacks on that date. Similarly, someone might oppose the "God Bless America" license plate because he is an atheist and believes that there is no God; because he believes in God, but also believes that America does not deserve God's blessings for some reason; or, that the attacks were an exercise of God's judgment. Certainly, the very nature of these plates belie Judge Michael's contention that none of the other plates authorized by the South Carolina General Assembly "bears a message on a politically controversial subject." App. 31a; *see also* App. 9a, n.2 (stating that this assertion "ignore[s] the fact that environmental policy, education policy, and government-sponsored references to God often generate public controversy") (Shedd, J., dissenting from denial of reh'g *en banc*). Any of these license plates is subject to challenge based on a simple

allegation by an individual that they were not afforded the same opportunity to speak.

In sum, this issue is important because it involves the "irreducible constitutional minimum of standing," which in turn involves whether a case or controversy exists under Article III of the United States Constitution. *Lujan*, 504 U.S. at 560. It also involves whether, as Judge Jones noted in her Fifth Circuit concurring opinion, which was echoed by the Eleventh Circuit in *Women's Emergency Network*, "the First Amendment [may be used as] a device for censorship rather than the enhancement of free speech." *Henderson*, 287 F.3d at 387. As a result of the judgment of the Fourth Circuit, an individual or organization can challenge and halt the communication of government speech even if they failed to independently make any effort to communicate an alternative viewpoint. Thus, review by this Court is necessary to correct the erroneous judgment rendered by the Fourth Circuit panel.

II. Even Assuming That Plaintiffs Have Standing, Review Is Warranted Because the Nature and Extent of the Government's Ability to Express its Own Viewpoint Through a Vehicle License Plate Is an Important Federal Question That Has Not Been, but Should Be, Settled by this Court.

There is no dispute but that a Government is entitled to express its own viewpoint and that it may do

so without permitting others to dilute the message. *E.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001). This rule is based on the common-sense observation that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Thus, the rule is supported by the existence of the political process established by the federal constitution and the constitutions of 50 states. *See id.* at 229, 235. This case involves the important federal issue whether the State of South Carolina can advance its own viewpoint through the medium of vehicle license plates in conjunction with a program to fund crisis pregnancy agencies that do not "provide, promote, or refer for abortion." S.C. Code Ann. § 56-3-8910.

The "Choose Life" statute is the most recent and apparently most visible expression in a long line of statements asserting the state's clear and oft-repeated preference for childbirth over abortion. There is little dispute but that South Carolina historically has expressed a preference for childbirth over abortion, as evidenced by the statutory prohibition against the use of state funds for abortion. *See* S.C. Code Ann. § 1-1-1035 (Law. Co-op. Supp. 2003) (prohibiting use of state funds to perform abortions); *id.* § 43-5-1185

(prohibiting use of family planning funds to pay for abortions); *id.* § 44-122-30 (prohibiting use of county grant funds for abortions). The State also demands that abortions not be performed until the patient is informed of the fetal development and of her right to review materials listing agencies offering alternatives to abortion. Woman's Right to Know Act, *id.* §§ 44-41-310 to -380 (Law. Co-op. 2002). The State requires that contraceptive and family planning information provided to recipients of Aid to Families with Dependent Children not reference abortion. *Id.* § 43-5-24 (Law. Co-op. Supp. 2003). Similarly, the State precludes instruction regarding abortion as a method of birth control as part of pregnancy prevention education, and also bars school districts from offering health education programs that include abortion information. *Id.* § 59-32-10 (Law. Co-op. 2004); *id.* § 59-32-30(D). In short, the State has consistently manifested a policy of advancing childbirth over abortion.

As a further manifestation of this policy, the "Choose Life" plate is government speech. *See Rust v. Sullivan*, 500 U.S. 173, 192-200 (1991). In fact, the speech is uttered as part of a program to provide additional funding to crisis pregnancy centers that do not "provide, promote, or refer for abortion." S.C. Code Ann. § 56-3-8910. Because the license plate is government speech, there is no requirement that the state create an avenue for the expression of opposing viewpoints regarding abortion in this context. *See Rust*,

500 U.S. at 194 ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.") (citation omitted).

The absence of the requirement for governments to provide for opposing viewpoints when they speak is important in numerous contexts. For example, the federal circuit has held that the United States may control the nature and character of flags flown at veterans' cemeteries and is not required to allow display of flags inconsistent with the message it wishes to communicate with regard to those cemeteries. *See Griffin v. Secretary of Veteran's Affairs*, 288 F.3d 1309 (Fed. Cir.), *cert. denied*, 537 U.S. 947 (2002). In *Griffin*, the plaintiff instituted an action challenging a regulation restricting to two days each year the display of the Confederate Flag at veterans' cemeteries. The federal circuit rejected that argument, concluding that the display of certain flags and the refusal to display others "does not implicate the First Amendment rights of others" and that "the government's decision to fly or not fly a particular flag ... does not trespass on the First Amendment." *Id.* at 1324. Similarly, a California district court concluded that anti-tobacco advertisements are government speech. *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1100-01 (E.D. Calif. 2003).

In this case, however, the Fourth Circuit panel concluded that the "Choose Life" license plate does not constitute government speech. Following a prior Fourth Circuit opinion, the panel considered (1) the central purpose of the program; (2) the editorial control exercised by the government; (3) the identity of the literal speaker; and, (4) the entity or individual who has the ultimate responsibility for the content of the plate. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of the Virginia Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002) (hereinafter "*SCV*"); *see* App. 42a-46a; (analysis of four factors by Judge Michael); App. 58a-61a (discussion of *SCV* analysis by Judge Luttig); App. 61a-63a (same by Judge Gregory). After considering these factors, Judge Michael determined that the factors led to the conclusion that the speech was both government and private in nature and that the State therefore is required to affirmatively provide for the expression of viewpoints contrary to that displayed on the "Choose Life" plate. But, even assuming that the SCV four-factor analysis is accurate, a proper application of that analysis leads to the conclusion that the "Choose Life" plate is government speech. *See* App. 12a-18a (Shedd, J., dissenting from denial of reh'g *en banc*).

In his individual opinion, Judge Michael concluded that the first two factors demonstrate that the "Choose Life" license plate is government speech. App. 42a-44a. That is, the purpose of the "Choose Life" statute is to communicate the State's viewpoint of

encouraging childbirth over abortion and to generate funds for crisis pregnancy services not providing or promoting abortions. App. 42a-43a. Moreover, the General Assembly itself exercised editorial control over the license plate because it created the statute and mandated the message. *See* App. 42a-43a; *see also* App. 14a-16a (Shedd, J., dissenting from denial of reh'g *en banc*). To this point, Judge Michael's analysis is accurate.

However, Judge Michael then concluded that the latter two factors weigh in favor of characterizing the "Choose Life" license plate as private speech. First, despite having concluded that the State retains editorial control over the message, Judge Michael and the panel then implicitly and erroneously rejected that conclusion to determine that the vehicle owner is the literal speaker merely because he elects to purchase the license plate. App. 44a-45a. But, it is far from apparent that a third-party viewing the message on a license plate, even a specialty license plate, automatically concludes that the person displaying the message is the literal speaker of that message. Certainly, courts are not of one mind on the subject. *See, e.g., Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 547-48 (Or. Ct. App. 2000) (*en banc*) (concluding that specialty license plates constitute government speech), *aff'd on other grounds*, 72 P.3d 628 (2003). In any event, what is apparent is that the person displaying the message has no control over the content of that message and, thus, is not the literal speaker of the message.

Furthermore, as Judge Shedd noted, the vehicle owner is not compelled to utter the message as was the plaintiff in *Wooley v. Maynard*, 430 U.S. 705, 713, 717 (1977). App. 16a-18a. As this Court already has recognized, there is a significant difference from a constitutional perspective between forbidding certain services or actions and establishing a program that does not include the provision of those services or actions. *See Rust*, 500 U.S. at 194; *see also Maher v. Roe*, 432 U.S. 464, 476-78 (1977) (comparing the argument that a state must fund abortion services if it funds non-abortion services to that expressed in *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which this Court concluded that a state could not forbid instruction in German but it could establish a program that did not include instruction in German). Thus, "[t]he vehicle owner's purchasing the specialty plate signifies his endorsement of the State's message, not his engaging the State to speak his own message." App. 17a-18a. Consequently, the panel erred in concluding that the vehicle owner is the literal speaker.

The panel also erroneously concluded that the State does not bear ultimate responsibility for the "Choose Life" message. "The General Assembly alone created the message, and it wrote that message into state law for the watching electorate to see." App. 18a (Shedd, J. dissenting from the denial of reh'g *en banc*). To the extent a unified view can be gleaned from the separate opinions, it appears the panel concluded that the political accountability this Court held important in

Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. at 235, is minimized or eliminated by communicating the message through a license plate. *See* App. 18a-19a. Again, however, the message communicated on a license plate is perceived to be a government message--especially as it pertains to the"Choose Life" statute at issue in this case--and, thus, one for which responsibility in this case correctly would be assigned to the State of South Carolina.

Moreover, as Judge Shedd noted, there is no support for the panel judgment that the governmental accountability in this case is minimized through use of a license plate. App. 20a-22a. Certainly, the record contains no indications regarding the proportion of South Carolina residents who agree with the "Choose Life" message. App. 20a-21a. In any event, as Judge Shedd correctly observes, the "Choose Life" statute was approved by a majority of the General Assembly that can, if the residents so choose, be turned out in favor of other representatives who will espouse an opposing point of view. App. 21a. Given the high level of scrutiny directed towards the issue of childbirth versus abortion, the public doubtlessly is well aware both of the existence of the license plate and the ultimate responsibility for that plate. App. 21a.

There is no doubt that this case involves important federal issues. It obviously involves First Amendment issues. It also involves the ability of the Government to express its viewpoint without distortion;

i.e., in this case, by distorting its message of promoting childbirth over abortion. Under the panel judgment, this and countless other programs are in danger of dilution or extinction. For example, the panel judgment would lead to the conclusion that the government must permit all types of flags to be flown at veterans' cemeteries, not just those that it concludes are appropriate. *Cf. Griffin,* 288 F.3d at 1324. Similarly, the decision of a California district court that anti-tobacco advertisements are government speech would be subject to challenge in this circuit, perhaps leading to the conclusion that the government also would be required to permit and perhaps even facilitate pro-smoking advertisements. *See Bonta*, 272 F. Supp. 2d at 1100-01.

Most importantly, however, it involves the ability of the government to express its viewpoint on a host of issues through license plates, including environmental issues, public education, the war on terror, and other public matters. App. 23a-24a (Shedd, J., dissenting from denial of reh'g *en banc*). As this Court has stated, "[i]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Southworth*, 529 U.S. at 229. As the panel correctly recognized, the "Choose Life" plate is exactly that: an effort by the State of South Carolina to advocate its own policies. App. 42a-43a. As such, it is a political communication made upon a political decision to express the "Choose Life" viewpoint. Although the federal courts must interpret and apply the Constitution,

"the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else--including the judiciary--deems state involvement to be." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). The panel judgment denies the states that opportunity, certainly as it pertains to license plates and, by analogy, to other forms of government communication, either alone or in conjunction with a program.

In sum, "[u]nder the panel's analysis, [the "Choose Life"] plates and others like them must be discontinued unless the General Assembly also provides for plates bearing contrary messages." App. 24a (Shedd, J., dissenting from denial of reh'g *en banc*). This result is inconsistent with the holding of this Court that the government need not distort its message when it is speaking. App. 24a; *see Rust*, 500 U.S. at 194. Ironically, although the panel based its decision in part on a perceived lack of accountability for license plate messages, this now-mandated distortion will diminish that accountability because the myriad of messages that governments will be required to communicate by the panel judgment if they elect to issue license plates advocating a particular political position guarantees that no one will be able to determine whether the government supports any of the messages. In light of the remarkable statement in Judge Michael's opinion that none of the other specialty license plates address a politically controversial subject, it is difficult to escape

the conclusion that the panel has acted as "an unelected federal judiciary [making] decisions about which state policies it favors and which ones it dislikes." *Garcia*, 469 U.S. at 546. It also has rejected the precedent of this Court pertaining to government speech and has applied it in a manner inconsistent with that followed in other circuits. Given these ramifications of the holding, the panel judgment must be reversed.

CONCLUSION

The petition for writ of certiorari should be granted. The Fourth Circuit panel judgment regarding the plaintiffs' standing conflicts with other circuit court decisions regarding similarly situated plaintiffs. Moreover, even assuming that plaintiffs have standing, the panel judgment also erroneously decided an important aspect of federal law that has not been, but should be, decided by this Court.

Respectfully submitted,

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September 24, 2004

Appendix A

United States Court of Appeals for the Fourth Circuit
Order Denying Petition for Rehearing and Rehearing
En Banc

United States Court of Appeals,
Fourth Circuit

PLANNED PARENTHOOD OF SOUTH CAROLINA INCORPORATED; Renee Carter,
Plaintiffs-Appellees,
v.
B. Boykin ROSE, in his official capacity as the Director of the Department of Public Safety of the State of South Carolina; Jon E. Ozmint, in his official capacity as the Director of the Department of Corrections of South Carolina; Kim S. Aydlette, in her official capacity as the Director of the Department of Social Services of South Carolina,
Defendants-Appellants.
Liberty Counsel; Louisiana Lawyers For Life; Louisiana Family Forum; Louisiana Law & Justice Foundation,
Amici Supporting Appellant.

No. 03-1118.

Filed: June 28, 2004.

ORDER

Appellants filed a petition for rehearing and rehearing *en banc.*

Judge Luttig, Judge Michael, and Judge Gregory voted to deny the petition for rehearing.

On the poll requested by a member of the court on the petition for rehearing *en banc,* Judge Widener, Judge Niemeyer, Judge Williams, Judge Traxler, and Judge Shedd voted to grant rehearing *en banc.* Chief Judge Wilkins, Judge Wilkinson, Judge Luttig, Judge Michael, Judge Motz, Judge King, Judge Gregory, and Judge Duncan voted to deny rehearing *en banc.*

The petition for rehearing is denied, and because the poll of judges in active service failed to produce a majority in favor of rehearing *en banc,* the petition for rehearing *en banc* is also denied. Judge Wilkinson wrote an opinion concurring in the denial of rehearing *en banc.* Judge Shedd wrote an opinion, joined by Judge Williams, dissenting from the denial of rehearing *en banc.*

WILKINSON, Circuit Judge, concurring in the denial of rehearing *en banc*:

At issue here is a South Carolina statute allowing citizens to opt for specialty license plates bearing the message "Choose Life." *See* S.C.Code Ann. § 56-3-8910. No specialty license plate with the opposite message is similarly available. Planned Parenthood of South Carolina, Inc. and Renee Carter have challenged the statute authorizing the "Choose Life" plates. The statute's message could be reversed

and the plaintiffs' position could be pro-life, not pro-choice, but the principles that govern this case would remain the same.

I vote to deny rehearing *en banc*. I simply do not believe the state should use license plates to practice viewpoint discrimination. *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 242 (Wilkinson, C.J., concurring in the denial of rehearing *en banc*). That is plainly what is happening here. The state is saying that its citizens may express one view on a profound controversy but not the other. Citizens are permitted to express their agreement with the officially sanctioned policy, but they have no similar outlet to express their disagreement with it. This is a presidential election year. May a state issue plates touting one candidate, but not another? It is one thing for states to use license plates to celebrate birds and butterflies, military service, historical events and scenic vistas. It is quite another for the state to privilege private speech on one side--and one side only--of a fundamental moral, religious, or political controversy.

The state would argue that its viewpoint discrimination is permissible, because its license plates constitute pure government speech. But the speech here only becomes speech by virtue of a citizen's choice. When speakers mount a soapbox or hoist a placard, one presumes they are free to create their own messages. I am not convinced that the mere presence of a license plate

allows the state unlimited authority to channel would-be speakers into privileged categories of expression of the state's own choosing.

Just as I considered *Sons of Confederate Veterans* "a free speech case, not ... a Confederate flag case," *id.* at 242, this to me is a First Amendment case, not a case about abortion. "It will not do to decide the same question one way between one set of litigants and the opposite way between another." Benjamin N. Cardozo, *The Nature of the Judicial Process* 33 (1921). The fact that Americans have deep differences of opinion on subjects such as these is all the more reason to recognize the unifying force of the First Amendment principle--namely, that none of us has the right to compel assent to our views, but that all of us have the right to express them. The state's failure to be neutral on the right to speak about our most divisive issues will give rise to great resentment. The confidence that all are treated equally with respect to belief, conscience, and expression enables Americans to transcend difference and to make "e pluribus unum" the lasting legacy of our nation.

SHEDD, Circuit Judge, dissenting from the denial of rehearing *en banc:*

According to the panel, the South Carolina General Assembly may enact a statute declaring "Choose Life" the official motto of the state, and that message may be printed on every standard license plate issued to vehicle

owners in the state, but the General Assembly may not take the *less* intrusive step of enacting a statute authorizing a specialty license plate bearing precisely the same message for interested vehicle owners willing to pay a higher fee. Not only is this result bizarre on its face, but it also reflects a misapplication of our recent decision in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles,* 288 F.3d 610 (4th Cir.2002) ("*SCV* "). Because the panel's decision unduly restricts the ability of elected officials to express the views of their constituents on *any* issue, however controversial, I dissent from the denial of rehearing *en banc.*[1]

I.

South Carolina issues a license plate to the owner of every vehicle registered in and licensed by the State. S.C. Code Ann. § 56-3-1210. The State owns every license plate, but state law requires that the plate be displayed on the vehicle. *Id.* There are two basic methods by which South Carolina permits issuance of

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[1]It is important to note that the panel's analysis applies equally to *all* messages printed on specialty license plates, not just messages concerning abortion. Given the wide variety of messages currently appearing on specialty plates in South Carolina, *see* discussion *infra,* the implications of this decision are far-reaching indeed.

specialty license plates. One method for obtaining a specialty plate is by application to the Department of Public Safety ("DPS") pursuant to the administrative approval process described in S.C.Code Ann. § 56-3-8000. Under this statute, a certified nonprofit organization (or a member of such organization) desiring a specialty plate must apply to DPS and submit four hundred prepaid applications or a $4,000 deposit, as well as a marketing plan for sale of the plate. *Id.* § 56-3-8000(A)-(B). DPS has discretion to "alter, modify, or refuse to produce" any organizational specialty plate that it deems "offensive" or that "fails to meet community standards." *Id.* § 56- 3-8000(H). Once approved, a specialty plate under this section is available only to certified members of the relevant organization. *Id.* § 56-3- 8000(D). Revenues generated by sales of such a plate may be spent only to defray the costs of producing non-profit organizational plates pursuant to this section. *Id.* § 56-3-8000(F).

A second method for obtaining a specialty plate is by direct action in the General Assembly. The General Assembly has enacted separate statutes authorizing issuance of specialty plates to members of certain organizations. *See, e.g.*, S.C.Code Ann. § 56-3-3410 (National Wild Turkey Federation); *id.* § 56-3-3800 (American Legion); *id.* § 56-3-7100 (Shriners); *id.* § 56-3-8200 (Rotary International); *id.* § 56-3-8400 (Lions Club); *id.* § 56-3-8600 (Ducks Unlimited). Likewise, the General Assembly has authorized specialty plates recognizing organizations for issuance

to any interested vehicle owner. *See, e.g., id.* § 56-3-3600 (South Carolina Nurses); *id.* § 56-3-4100 (South Carolina Elks Association); *id.* § 56-3-90 (Sertoma International). In addition, the General Assembly has approved specialty plates for disabled veterans, *id.* § 56-3-1120; former prisoners of war, *id.* § 56-3-1150; Medal of Honor recipients, *id.* § 56-3-1850; Purple Heart recipients, *id.* § 56-3-3310; Normandy Invasion survivors, *id.* § 56-3-5350; Pearl Harbor survivors, *id.* § 56-3-5920; and World War II veterans and their spouses, *id.* § 56-3-8800, among others. The General Assembly has even approved a specialty plate commemorating the introduction of the "Shag" as South Carolina's state dance. *Id.* § 56-3-3910.

The General Assembly does not authorize specialty plates merely to recognize certain individuals, organizations, and the official dance. Some authorizing statutes earmark revenues generated from sales of specialty plates to support identified programs. *See, e.g., id.* § 56-3-5010 (earmarking a portion of the fees generated by the "Public Education: A Great Investment" plate for the purchase of computers in identified school districts); *id.* § 56- 3-7300 (requiring fees collected for sales of a Saltwater Fishing plate to be deposited into a special account for management and conservation of the state's marine resources); *id.* § 56-3-7910 (requiring fees collected for sales of the *H.L. Hunley* submarine plate to be distributed to the Fund to Save the *Hunley* for continued curation efforts); *id.* § 56-3-9100 (earmarking proceeds from sales of the

South Carolina Technology Alliance plate for development of high technology programs and businesses); *id.* § 56-3-930 (earmarking proceeds from sales of "United We Stand" plates for deposit into a fund created to establish rewards for the capture of terrorists); *id.* § 56-3-9500 (designating proceeds from sales of "God Bless America" plates for use by the South Carolina National Guard for homeland security purposes); *id.* § 56-3-9600 (designating proceeds from sales of "No More Homeless Pets" plates for animal spaying and neutering programs).

On rare occasions, the General Assembly takes the unusual step of prescribing the message that appears on a specialty plate. For instance, the Nongame Wildlife and Natural Areas Fund plate must bear the message "South Carolina Protects Endangered Species," *id.* § 56-3-4510, and another plate must bear the message "Public Education: A Great Investment," *id.* § 56-3-5010. The General Assembly has authorized specialty plates bearing the messages "Conserve South Carolina," *id.* § 56-3-2540; "Keep South Carolina Beautiful," *id.* § 56-3- 3950; "In God We Trust," *id.* § 56-3-9200; "United We Stand," *id.* § 56-3- 9300; and "God Bless America," *id.* § 9500, among others.[2]

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[2]The panel erroneously asserts that South Carolina does not authorize specialty plates bearing messages concerning "politically controversial" subjects. *Planned Parenthood of S.C. Inc. v. Rose,* 361

In 2001, the General Assembly enacted a separate statute authorizing the issuance of a specialty plate bearing the message "Choose Life." *Id.* § 56-3- 8910. This plate is available to all interested vehicle owners in the State. *Id.* § 56-3-8910(A). Purchasers of the "Choose Life" plate must pay a $70 fee every other year in addition to the basic fee for license plates, and proceeds from sales of this plate are earmarked for a special account from which the South Carolina Department of Social Services makes grants to support crisis pregnancy programs. *Id.* § 56-3-8910(A)-(B). The statute specifically provides that such grants "may not be awarded to any agency, institution, or organization that provides, promotes, or refers for abortion." *Id.* § 56-3-8910(B). Under the "Choose Life" statute, production of the specialty plate could commence once the South Carolina Department of Motor Vehicles received four hundred prepaid applications or a $4,000 deposit; in this respect, the "Choose Life" statute is identical to other specialty license plate statutes that support special programs and prescribe particular messages. *See, e.g., id.* § 56-3-4410; *id.* § 56-3-5200;

F.3d 786, 788 (4th Cir. 2004). Not only does this assertion ignore the fact that environmental policy, education policy, and government-sponsored references to God often generate public controversy, but it erroneously suggests that the degree of controversy surrounding a particular message affects the status of that message vis-a-vis the First Amendment.

id. § 56-3-7300; *id.* § 56-3-7910; *id.* § 56-3-9100;id. § 56-3-9200; *id.* § 56-3-9300; *id.* § 56-3- 9500; *id.* § 56-3-9600.

II.

The outcome of this case depends upon the proper characterization of the statutorily prescribed "Choose Life" message as private speech or government speech.[3] If the "Choose Life" message is properly labeled private speech, then the government has preferred one private message over other messages based upon the viewpoints of those messages. The First Amendment ordinarily does not permit such viewpoint

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[3]The State sought reconsideration of the standing issue as well as the substantive First Amendment issue. At the very least, the panel's standing analysis should have reckoned with contrary decisions from the Fifth and Eleventh Circuits in the only other federal appellate cases involving "Choose Life" license plates. *See Henderson v. Stalder,* 287 F.3d 374 (5th Cir.), *cert. denied,* 537 U.S. 1048, 123 S.Ct. 602, 154 L.Ed.2d 521 (2002); *Women's Emergency Network v. Bush,* 323 F.3d 937 (11th Cir.2003). Indeed, the Eleventh Circuit found standing lacking even where the plaintiffs had attempted, but failed, to obtain enactment of a statute authorizing pro-choice specialty plates. *Women's Emergency Network,* 323 F.3d at 946 n. 12. No such effort was made in this case.

discrimination. *SCV,* 288 F.3d at 622 (citing *Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998), and *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). If, on the other hand, the "Choose Life" message is properly labeled government speech, then the ordinary prohibition against viewpoint discrimination is inapplicable and the statute survives First Amendment scrutiny. The government can speak for itself, and it can take measures designed to ensure that its message is not distorted. *SCV,* 288 F.3d at 616-17 (citing *Board of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), and *Griffin v. Department of Veterans Affairs,* 274 F.3d 818, 822 (4th Cir.2001)). As we noted in *SCV,* "[t]he rationale behind the government's authority to draw otherwise impermissible viewpoint distinctions in the government speech context is the accountability inherent in the political process." 288 F.3d at 618 (citing *Southworth,* 529 U.S. at 235, 120 S.Ct. 1346).[4]

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[4]Drawing distinctions between private speech and government speech can be a difficult task in the context of license plates. Since the government produces the plate, issues the plate for identification purposes, and actually owns the plate, it may always be said that the government speaks whatever message appears on a particular plate; at the same time, since a private

In determining whether a particular message constitutes private speech or government speech, we consider four separate, but closely related, factors: (1) the purpose of the program in which the speech occurs, (2) the degree of editorial control over the speech by the government, (3) the identity of the literal speaker, and (4) which party--the government or a private party--bears ultimate responsibility for the speech. *SCV,* 288 F.3d at 618- 19.

The speech at issue in *SCV* was the background logo of the Sons of Confederate Veterans, which included a

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individual or entity owns the vehicle on which the plate is displayed, there is a very real sense in which that private party may be said to speak the message that appears on the plate. *See Planned Parenthood,* 361 F.3d at 794; *Sons of Confederate Veterans v. Commissioner of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 245-46 (4th Cir.2002) ("*SCV II* ") (Luttig, J., respecting denial of reh'g *en banc*); *id.* at 252 (Gregory, J., dissenting from denial of reh'g *en banc*). Nevertheless, while the "private speech" and "government speech" categories are imprecise when applied to messages printed on license plates, they remain useful in describing the degree of government involvement in creating and speaking particular messages. The bottom-line question, then, is whether the government speech component to the "Choose Life" message is so substantially greater than the private speech component that the message may fairly be characterized as "government speech."

representation of the Confederate flag. Although the Virginia legislature approved a specialty plate for the group, the authorizing statute included a unique restriction that prohibited the use of any symbol or emblem on the plate. We invalidated this logo restriction on the ground that it impermissibly discriminated against private speech based upon the viewpoint expressed by inclusion of the Confederate flag in the Sons of Confederate Veterans' logo. *Id.* at 626, 629.

In reaching this conclusion, we noted that the purpose of the program in which the speech occurred was to "produce revenue while allowing, on special plates authorized for private organizations, for the private expression of various views." *Id.* at 619. Moreover, the state exercised "little, if any" editorial control over the content of specialty license plates. *Id.* at 621. Citing *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), for the proposition that "license plates ... implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle," we concluded that the literal speaker was the vehicle owner rather than the government and that the vehicle owner bore ultimate responsibility for the message conveyed by the Sons of Confederate Veterans logo. *SCV,* 288 F.3d at 621. As a result, we held that the background logo on the Sons of Confederate Veterans specialty plate was private speech rather than government speech. *Id.*

The statutory scheme at issue here differs in material respects from the scheme at issue in *SCV*, and I believe that the four-factor analysis yields a different result. With respect to the first factor, there can be no doubt that the primary purpose of the "Choose Life" statute is to express the General Assembly's current position on the abortion issue. A secondary purpose of the statute is to generate revenues for crisis pregnancy programs, specifically programs that do not provide or promote abortions. As the panel correctly recognized, this statute was intended to make a statement about the General Assembly's preference for the pro-life position. *Planned Parenthood,* 361 F.3d at 793.

It is equally clear that the General Assembly exercised *complete* editorial control over the "Choose Life" plate. The General Assembly created and codified the particular message that appears on the plate. Unlike the statute at issue in *SCV*--and unlike most other specialty-plate statutes in South Carolina--the "Choose Life" statute actually mandates the message that appears on the plate.

To this point in the analysis, the "Choose Life" message is plainly government speech. The government intended to express its own viewpoint, and it created a message to achieve that objective. The panel concedes this much. *Planned Parenthood,* 361 F.3d at 793. At this point, however, the panel takes a turn toward private speech that I find unwarranted. While I do not disagree that the vehicle owner is *a* literal speaker with respect to the

"Choose Life" message, the panel's analysis too quickly dismisses the government's role as the predominant speaker.

The panel begins with the modest proposition that messages on license plates "are associated at least partly with the vehicle owners." *Planned Parenthood,* 361 F.3d at 794 (citing *Wooley,* 430 U.S. at 717, 97 S.Ct. 1428). Indeed, *Wooley* goes no further than that. At issue in *Wooley* was a New Hampshire statute making it a misdemeanor knowingly to obscure the figures or letters on a license plate, including the state's motto, "Live Free or Die." The Supreme Court held that New Hampshire could not punish vehicle owners who registered their objections to the state motto by obscuring that message on their license plates. *Id.* at 717, 97 S.Ct. 1428. More broadly, a state cannot "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713, 97 S.Ct. 1428. Because there is nothing in this case remotely akin to compelled speech, *Wooley* is of little use here. For present purposes, *Wooley* suggests that (1) the government can speak its messages through the medium of license plates but (2) vehicle owners may choose to reject the government's messages. Thus, *Wooley* recognizes that both the government and the vehicle owner are literal speakers, to varying degrees, with respect to messages printed on license plates. To decide this case (and any specialty

license plate case), we must ask whether any peculiar circumstance surrounding the specialty plate so diminishes the government's role as a literal speaker or highlights the vehicle owner's role as a literal speaker that one or the other party must be deemed the sole speaker.

The panel concludes that the vehicle owner should be treated as the literal speaker of the message on a specialty license plate because "the specialty plate gives private individuals the option to identify with, purchase, and display one of the [State's] authorized messages." *Planned Parenthood,* 361 F.3d at 794. I disagree. By giving interested citizens the option to endorse its message, the State has not lost its place as the literal speaker of that message. The proper question is whether the private citizen "engages the government to publish *his* message" or the government "engages the private citizen to publish *its* message." *SCV II,* 305 F.3d at 246 (Luttig, J.). The Virginia statute at issue in *SCV* called for a specialty plate to be issued only upon application by an organization, with the design of that plate proposed by the organization. Thus, the message was created by private citizens, and it was left to the government to approve or disapprove that message. By contrast, under South Carolina's "Choose Life" statute, the government expresses its message on its own initiative, and private citizens are invited to take that message or leave it. Private citizens do not suggest the message, nor do they compose it. On their own, they cannot change the message. The vehicle owner's

purchasing the specialty plate signifies his endorsement of the State's message, not his engaging the State to speak his own message.

Just as the State should be deemed the literal speaker of the "Choose Life" message, so the State will bear ultimate responsibility for that message. The General Assembly alone created the message, and it wrote that message into state law for the watching electorate to see. Assuming that the panel correctly perceives the divisiveness of the abortion issue in South Carolina, that fact would suggest a *heightened* awareness by voters of the General Assembly's role in authorizing the "Choose Life" plate. I can think of no more transparent act of government than the enactment of a statute that says in plain terms what it purports to do. I can think of no clearer demonstration of political accountability than for citizens opposed to this "Choose Life" license plate to turn out the current government and replace it with a government that will amend or repeal the statute and perhaps even replace it with a statute calling for pro-choice specialty plates. *See Southworth,* 529 U.S. at 235, 120 S.Ct. 1346 ("When the government speaks ... it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."). According to the factors set out in *SCV*, South Carolina's "Choose Life" license plate is properly characterized as government speech, not private speech, and is therefore permissible under the First Amendment.

III.

The "Choose Life" statute does not create a forum for private expression so much as it supports an established government program. The Supreme Court in *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), approved the federal government's policy of offering federal funds to private health clinics on the condition that those clinics not counsel or provide abortions. *Id.* at 193, 111 S.Ct. 1759. Answering the argument that the federal government was restricting private physicians' speech based upon viewpoint, the Court stated that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* In other words, when the government establishes a program, it is permitted to define the contours of that program as it sees fit. *Rust,* 500 U.S. at 194, 111 S.Ct. 1759. The government may refuse to fund speech that is inconsistent with the program thus defined. *Id.* at 194-95, 111 S.Ct. 1759.

The "Choose Life" statute is analogous to the federal regulations at issue in *Rust.* The "Choose Life" statute earmarks revenues generated from sales of this specialty plate for a government grant program established to

fund crisis pregnancy services that specifically do not counsel abortion. In furtherance of this identified program, the statute offers the plates for sale to private persons who wish to support the "Choose Life" message and the crisis pregnancy grant program. Just as in *Rust,* the government has created a program and enlisted willing participants to support that program. As in *Rust,* "we have not here the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* If the government can actually *restrict* private entities' speech in furtherance of an established government program, as it did in *Rust,* then surely it can speak its own message--without restricting anyone else's speech--in furtherance of such a program. *See* 500 U.S. at 193, 111 S.Ct. 1759 (stating that "[t]here is a difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy").

Perhaps even more troubling are the panel's contentions that "the State's role in promoting the Choose Life message is obscured from the public" and that the "Choose Life" statute represents "cloaked advocacy" that insulates the General Assembly from criticism and electoral retribution. *Planned Parenthood,* 361 F.3d at 795-96, 798. Nothing but the panel's conjecture supports such conclusions.

According to the panel, ordinary South Carolinians will likely be *misled* into believing that the presence of the "Choose Life" plate and the absence of an opposing plate "are the result of popular choice." *Id.* at 798. Likewise, the panel worries that ordinary citizens might be *misled* into thinking that the State "has already won support for the position it is promoting." *Id.* The panel offers no justification for its suspicion that the government of South Carolina--the General Assembly and the governor-- misrepresented popular sentiments when it enacted the "Choose Life" statute. In any event, whether or not a majority of South Carolina voters approve the "Choose Life" message, a majority of their elected representatives did approve that message in open session and on a public record. If those duly elected representatives misjudged their constituents' opinions, then they will be held accountable for their error; if the abortion issue is as controversial in South Carolina as the panel asserts, then a legislator's vote on the "Choose Life" statute will surely be noticed. We ought not short-circuit regular political processes based upon speculation that the citizens of South Carolina cannot discern what role their elected representatives played in enacting the "Choose Life" statute.

The mere fact that the General Assembly has authorized a myriad of specialty license plates does not diminish its accountability for the "Choose Life" message. First, it is the rare specialty plate for which the General Assembly actually writes the message--an act more conspicuous when it happens than the simple approval

of an organization's suggested design. Second, if the panel is correct that abortion is an especially divisive issue in South Carolina, then the General Assembly's taking the extraordinary step of authoring the "Choose Life" message would be expected to draw extraordinary public attention. Under the panel's view, merely allowing issuance of plates other than the standard plate so confuses ordinary citizens that they cannot be expected to know when their legislature takes sides in an important debate.[5]

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[5]The panel's suggestion that the General Assembly scrap the "Choose Life" statute and replace it with a new statute making "Choose Life" an official motto of the State is dubious at best. Under the panel's own reasoning, the problem here is the *medium:* Specialty license plates do not readily identify the literal speaker of the message, such that ordinary citizens cannot hold their elected leaders accountable for their role in speaking that message. *Planned Parenthood,* 361 F.3d at 798-99. If the problem is the *medium,* then it should make no difference at all whether "Choose Life" is designated an official motto. By the panel's logic, *no message appearing on a specialty license plate can be treated as government speech* because the *medium* obscures the State's role as a speaker.

IV.

"It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens." *Southworth,* 529 U.S. at 229, 120 S.Ct. 1346. Indeed, the General Assembly has adopted and pursued a policy concerning abortion that is contrary to some South Carolinians' sincere convictions. The question here is not whether the General Assembly has expressed the *correct* position, or even the more *popular* position; rather, the question is whether the General Assembly may express *any* position on a specialty license plate. The panel says it may not, even though there is no danger that vehicle owners who object to the "Choose Life" message will be compelled to display this plate and even though the General Assembly (unlike the Virginia legislature in *SCV*) has not in any way singled out a group or message for unfavorable treatment. This holding unduly restricts the ability of state governments to express the views of their constituents on matters of public importance.

It is important to note that the panel's holding affects much more than the "Choose Life" plate alone. The General Assembly has taken similar action with respect to environmental conservation, S.C.Code Ann. § 56-3-3950; public education, *id.* § 56-3-5010; and even the war on terror, *id.* § 56-3-9300. The messages expressed on these topics may be described as

ideological and even controversial. Like the "Choose Life" plate, the specialty plates approved in these statutes are the creatures of ordinary political processes; their messages are prescribed by the legislature itself; and they are made available to any interested vehicle owner willing to pay an extra fee. Like the "Choose Life" plate, these plates generate revenues earmarked for specific government programs. Under the panel's analysis, these plates and others like them must be discontinued unless the General Assembly also provides for plates bearing contrary messages. In other words, the State cannot speak through specialty license plates *unless* it dilutes or distorts its own message. *Cf. Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 541, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (noting that when the government speaks, it can take steps to ensure that its message is not "garbled or distorted").

We have come a long way from *Wooley* 's instruction that a State may not conscript private vehicles to serve as "mobile billboards" for its messages. The objectors in *Wooley* expressed their rejection of the State's message by covering that message with tape. Now it seems that the State, before it speaks, must anticipate the objection of a citizen and place the tape over its own message. In the end, the panel's decision muzzles everyday political action based on the mistaken belief that reasonable citizens cannot tell that their government is speaking when it enacts a specific statute calling for production of a specialty license plate bearing a particular message. If a government cannot be

deemed to speak through such a statute, then I wonder how it can speak at all.

Judge WILLIAMS joins in this opinion.

Appendix B

United States Court of Appeals for the Fourth Circuit
Panel Opinion Dated March 22, 2004

United States Court of Appeals,
Fourth Circuit.

PLANNED PARENTHOOD OF SOUTH CAROLINA INCORPORATED; Renee Carter,
Plaintiffs-
Appellees,
v.
B. Boykin ROSE, in his official capacity as the Director of the Department of Public Safety of the State of South Carolina; Jon E. Ozmint, in his official capacity as the Director of the Department of Corrections of South Carolina; Kim S. Aydlette, in her official capacity as the Director of the Department of Social Services of South Carolina,
Defendants-Appellants.
Liberty Counsel; Louisiana Lawyers for Life; Louisiana Family Forum; Louisiana Law & Justice Foundation, Amici Supporting Appellant.

No. 03-1118.

Argued: Sept. 23, 2003.
Decided: March 22, 2004.

Luttig, Circuit Judge, filed opinion concurring in judgment.

Gregory, Circuit Judge, filed opinion concurring in judgment.

ARGUED: Tracey Colton Green, Assistant Deputy Attorney General, Office of the Attorney General, Columbia, South Carolina, for Appellants. Carrie Y. Flaxman, Planned Parenthood Federation of America, New York, New York, for Appellees. **ON BRIEF:** Henry McMaster, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Office of the Attorney General, Columbia, South Carolina, for Appellants. Roger Evans, Donna Lee, Planned Parenthood Federation of America, New York, New York; Peter L. Murphy, Law Offices of Peter L. Murphy, Columbia, South Carolina; Michael P. O'Connell, Stirling & O'connell, P.A., Charleston, South Carolina, for Appellees. Mathew D. Staver, Erik W. Stanley, Joel L. Oster, Anita L. Staver, Rena M. Lindevaldsen, Liberty, Longwood, Florida, for Amicus Curiae Liberty. J. Michael Johnson, Alliance Defense Fund, Shreveport, Louisiana, for Amici Curiae Lawyers for Life, et al.

Before LUTTIG, MICHAEL, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge MICHAEL wrote a separate opinion and announced the judgment. Judge LUTTIG wrote an opinion concurring in the judgment. Judge GREGORY wrote an opinion concurring in the judgment.

OPINION

MICHAEL, Circuit Judge, writing separately in parts I, II, and III and announcing the judgment in part IV:

South Carolina has a statute that authorizes a specialty license plate imprinted with the words "Choose Life." A comparable plate with a pro-choice message is not available. Planned Parenthood of South Carolina, Inc. (PPSC) and Renee Carter have sued three South Carolina officials on First Amendment grounds, claiming that the statute authorizing the Choose Life plate amounts to viewpoint discrimination by the State. The district court agreed and declared the statute unconstitutional. We affirm in three opinions, with Judge Luttig and Judge Gregory each writing separately to concur in the judgment.

I.

In 2001 the South Carolina legislature enacted a statute, *see* S.C.Code Ann. § 56-3-8910 (the Act), that authorizes the issuance of a specialty license plate bearing the message "Choose Life." The Act directs the Department of Public Safety (DPS) to begin production of the plate when it receives either 400 prepaid applications or a deposit of $4000 from an interested individual or organization. S.C.Code Ann. § 56-3-8910(C). Sale of the Choose Life plate is expected to generate additional revenue for the State; the fee for the special plate is seventy dollars every two

years in addition to the regular fee. *Id.* § 56-3-8910(A). Proceeds from the sale of the Choose Life plate are to be placed in a special account administered by the Department of Social Services (DSS). *Id.* § 56-3-8910(B). The DSS may award grants from this account to local, private nonprofit organizations that provide "crisis pregnancy services," but grants may not go to "any agency, institution, or organization that provides, promotes, or refers for abortion." *Id.* The Act makes the Choose Life plate available to any interested vehicle owner in the State. *Id.* § 56-3-8910(A).

South Carolina also has a more general statute that authorizes the issuance of specialty license plates to nonprofit organizations. *Id.* § 56-3-8000. An organization interested in obtaining a specialty plate may apply to the DPS by submitting proof of its nonprofit status along with 400 prepaid applications or a $4000 deposit, a design for the plate, and a marketing plan for its sale that is subject to DPS approval. The plate may bear only the "emblem, a seal or other symbol" of the organization that the DPS "considers appropriate," *id.* § 56-3-8000(A), and the DPS has the discretion to "alter, modify, or refuse to produce" any organizational plate that "it deems offensive or [that] fails to meet community standards," *id.* § 56-3-8000(H). Finally, the plate is available only to certified members of the organization.

Additional statutory provisions authorize various other specialty plates, most of which recognize veterans or

members of civic organizations; these plates can be issued only to the designated honorees or organization members. *See, e.g., id.* § 56-3-3310 (recipients of Purple Heart); § 56-3- 2810 (volunteer firemen); § 56-3-5910 (Pearl Harbor survivors); § 56-3-5350 (Normandy invasion survivors); § 56-3-7860 (Shriners). Other plates, such as those bearing messages of state pride, are authorized for issuance to any vehicle owner. *See, e.g., id.* § 56-3-3950 (authorizing the "Keep South Carolina Beautiful" plate). None of these plates, however, bears a message on a politically controversial subject.

PPSC never applied for an organizational plate (one with only an emblem or symbol) under S.C.Code Ann. § 56-3-8000. However, in 2001, when a bill to authorize the Choose Life plate was being considered at a subcommittee hearing in the South Carolina House of Representatives, a PPSC representative testified that the bill should be amended to add a "provi[sion] for a license plate for automobile owners who wish to express [the pro-choice] view." J.A. 29-30. That bill died in committee. A bill to authorize the Choose Life plate was also introduced in the South Carolina Senate in 2001, but consideration of the bill was blocked by parliamentary objections. Later on in the 2001 legislative session, a bill authorizing a NASCAR specialty license plate was amended to provide for the Choose Life plate; the amended bill passed both houses in June 2001 and was signed into law by the Governor in September of that year. It does not appear that any

pro-life organization initiated the idea of a Choose Life plate. Rather, the statutory provision for the plate (the Act) came about because of the perseverance of two legislators who were acting on their own initiative.

There are notable differences between the Act authorizing the Choose Life plate and § 56-3-8000, which authorizes specialty plates for nonprofit organizations. First, the Act authorizes a plate bearing a specified message, but § 56-3-8000 authorizes plates bearing only the symbol or emblem of an organization. Second, the Act authorizes the issuance of the Choose Life plate to any interested person, but § 56-3-8000 authorizes the issuance of an organizational plate only to certified members of an organization. Finally, § 56-3-8000 does not automatically entitle an organization to its own plate; the section vests certain discretion in the DPS to reject an application or to modify the proposed symbol. S.C.Code Ann. § 56-3-8000(H).

Within days after the Act went into effect, the plaintiffs (PPSC and Carter) filed suit seeking declaratory and injunctive relief against the state officials (the State) charged with administering the Choose Life license plate program and with distributing the proceeds from the sale of the plate. Plaintiff PPSC is an organization that provides family planning services to women, including first-trimester abortions and abortion referrals. Plaintiff Carter is a South Carolina resident who owns a passenger car registered in that state. The

plaintiffs claim, among other things, that the Act violates the First Amendment because it regulates access to a speech forum on the basis of viewpoint. Both sides moved for summary judgment on the merits, and the State in addition claimed that the plaintiffs lacked standing to sue. The district court concluded that the plaintiffs had standing and granted their motion for summary judgment, holding that the Act discriminates based on viewpoint in violation of the First Amendment. *Planned Parenthood of S.C., Inc. v. Rose (PPSC),* 236 F. Supp. 2d 564 (D.S.C.2002). The State appeals, and our review is de novo. *Higgins v. E.I. DuPont de Nemours and Co.,* 863 F.2d 1162, 1167 (4th Cir.1988).

II.

The threshold question is whether the plaintiffs have standing to challenge the Act. Standing doctrine is "an amalgam of prudential as well as constitutional concerns." *Finlator v. Powers,* 902 F.2d 1158, 1162 (4th Cir.1990). The constitutional concern about standing is rooted in Article III, which limits federal court jurisdiction to actual "cases" and "controversies." A justiciable case or controversy requires a "plaintiff [who] has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976). Thus, to establish standing, a

plaintiff must show (1) an actual or threatened injury (2) that was caused by the putatively illegal conduct of the defendant and (3) that is likely to be redressed by a favorable decision. *Heckler v. Mathews,* 465 U.S. 728, 738, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

One injury the plaintiffs allege is the discriminatory treatment they suffer from the State's use of the license plate forum to promote one political viewpoint (pro-life) in the debate about abortion. The plaintiffs allege that the Act authorizing the Choose Life plate causes the discriminatory treatment by allowing pro-life supporters, but not pro-choice supporters, to express their viewpoint in the license plate forum. They further assert that striking down the Act would redress the discrimination even though this remedy would not grant them access to the license plate forum. The plaintiffs are correct.

Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes. *Heckler,* 465 U.S. at 738, 104 S.Ct. 1387; *Baker v. Carr,* 369 U.S. 186, 207, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Moreover, plaintiffs in discrimination cases may seek equal treatment in the form of a level playing field, regardless of whether this is achieved by extending benefits to the disfavored group or by denying benefits to the favored group. *Heckler,* 465 U.S. at 738-39, 104 S.Ct. 1387. For

instance, in *Regents of University of California v. Bakke,* 438 U.S. 265, 281 n. 14, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the Supreme Court explained that a medical school applicant who was denied admission had standing to challenge the school's race-based admissions policy regardless of whether he showed "that he would have been admitted in the absence of the [admissions policy]." The applicant in *Bakke* met "the constitutional requirements" of standing because he had been denied a chance to compete for admission on equal terms. *Id.* Similarly, the Court said in *Heckler v. Mathews* that it "frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." 465 U.S. at 738, 104 S.Ct. 1387. *See also Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) (male plaintiff had standing to challenge discriminatory system of alimony payments even though the result of the challenge might be to impose the burden of payment on both women and men rather than to eliminate the burden of payment on men).

This level playing field analysis, though typically seen in equal protection cases, also applies in First Amendment cases. Just as a plaintiff claiming discrimination under the Fourteenth Amendment has standing to seek a level playing field, so too does a plaintiff claiming viewpoint discrimination under the First Amendment. *See Police Dep't of Chicago v.*

Mosley, 408 U.S. 92, 101-02, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); J. Nowak & R. Rotunda, *Constitutional Law*, § § 2.12, 16.11 (6th ed.2000). In short, where, as here, plaintiffs challenge a law on the ground that it promotes an opposing political viewpoint above their own, they suffer a cognizable injury that can be redressed by the invalidation of that law.

The plaintiffs also allege as an injury their inability to obtain a pro-choice license plate, but this does not entitle them to standing. The plaintiffs have never been able to obtain a South Carolina license plate that bears words with the pro-choice message. Thus, their inability to obtain a pro-choice plate was not caused by the enactment of the Choose Life Act, nor would this alleged injury be redressed by invalidating the Act. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). Moreover, characterizing the relevant injury as the inability to obtain a license plate obscures the constitutional nature of the harm in this case. There are no doubt people in South Carolina who would like to order a particular specialty plate that the legislature has not seen fit to authorize. But this case is not about people seeking to obtain license plates bearing the messages of their choice; it is about whether, by enacting the Choose Life Act, the State has impermissibly favored one viewpoint over another. Therefore, the sounder approach is to recognize discriminatory treatment as the actual injury and to accord the plaintiffs standing on that basis.

The State's arguments against standing are not convincing. The State first claims that the plaintiffs have suffered no injury because the Act, though failing to authorize expression of the opposing viewpoint, does not prohibit it. This contention ignores the obvious. Although the expression of the plaintiffs' pro-choice viewpoint is not explicitly prohibited, it is effectively prohibited. A person whose preferred plate is not authorized by the State cannot, as an alternative, display a privately manufactured license plate that bears the message of her choice. Specialty license plates are a state-controlled medium of expression; whatever speech is not authorized by the State is therefore prohibited. *See, e.g.,* S.C.Code Ann. § § 16-21-50, 56-3-1370. Further, the State fails to recognize that the plaintiffs need not show an explicit prohibition on their speech in order to claim discriminatory treatment. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). In *Rosenberger* the Supreme Court made clear that "government regulation may not favor one speaker over another." *Id.* The plaintiffs may therefore base their claim of injury on the State's unequal treatment of two viewpoints in the abortion debate, specifically, its promotion of only the pro-life view.

The State also claims that the plaintiffs suffered no injury (that is, no discriminatory treatment) because they failed to apply for a license plate under § 56-3-8000, the law governing specialty plates for non-profit organizations. The plaintiffs' failure to apply

for an organizational plate is not fatal to their standing to challenge the Act. Even assuming that the plaintiffs would have been able to obtain an organizational plate, such a plate would not allow an expression that is equivalent to the Choose Life plate. Under the current statutory scheme, any pro-life South Carolina driver can display a plate bearing the Choose Life message. In contrast, a pro-choice South Carolina driver could, at best, display a plate bearing the emblem of a pro-choice organization, assuming she was a certified member of that organization. Therefore, the complained-of unequal treatment (or discrimination) would persist regardless of whether the plaintiffs actually applied for or even obtained an organizational plate.

Moreover, waiting for the plaintiffs to apply for a specialty plate under the organizational statute would neither change the plaintiffs' stake in the controversy nor sharpen the issues for review. We addressed this sort of situation in *Finlator v. Powers,* where the plaintiffs challenged a discriminatory tax law without first protesting the payment of the tax with the top state tax official. In that case we said that requiring the plaintiffs to protest the tax and then refile their suit would not improve the "parties' advocacy ... clarify the legal issues presented for review ... or ... contribute in any way to our ability to decide a question presented and contested by parties." *Finlator,* 902 F.2d at 1162. As a result, we concluded that the plaintiffs had standing to bring a facial challenge to the law. For the same reason, the plaintiffs in this case need not first

apply for, and be denied, an organizational plate in order to gain standing.

Finally, a note on the prudential front: because the plaintiffs are a pro-choice organization and an individual seeking a pro-choice license plate, they are appropriate parties to challenge the Choose Life Act. If we were to deny standing to the plaintiffs, it is unlikely that anyone would have standing, and the Act would effectively be immune from attack. *See Orr,* 440 U.S. at 272, 99 S.Ct. 1102 (granting standing after recognizing the possibility that a statute would otherwise be immune from attack).

In sum, the plaintiffs have alleged a sufficient personal stake in the outcome of this controversy to warrant their invocation of federal jurisdiction to challenge the Act.

III.

A.

The First Amendment question before us is whether the State engaged in impermissible viewpoint discrimination when it authorized, through the Act, a license plate with the Choose Life message. The usual first step in answering such a question is to classify the relevant message as either government speech or private speech. *See Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles (SCV),* 288 F.3d 610, 616 (4th

Cir.2002); *PPSC,* 236 F.Supp.2d at 570. This threshold inquiry is generally dispositive in viewpoint discrimination cases because of three common assumptions: first, that all speech is either government speech or private speech; second, that when the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint; and third, that the government may not discriminate based on viewpoint when it regulates private speech. As the Supreme Court explained in *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), when the government speaks for itself, it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." In contrast, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Id.* at 828, 115 S.Ct. 2510. Not surprisingly, the State claims that the Choose Life message on the license plate is government speech; the plaintiffs claim just the opposite.

Our court recently grappled with whether speech was government or private in another case involving a specialty license plate. *See SCV,* 288 F.3d 610. There we acknowledged that "[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so." *Id.* at 618. In *SCV,* the Sons of Confederate Veterans

(SCV), a nonprofit organization, applied under a Virginia statute for a specialty license plate to be issued to its members. Although the Commonwealth of Virginia authorized issuance of an organizational plate to members of the SCV, it prohibited the plate from bearing the SCV emblem because the emblem included the Confederate flag. We concluded that the restriction prohibiting display of the organization's emblem, though neutral on its face, was in fact discriminatory because it was aimed at the suppression of the SCV's viewpoint. *Id.* at 623-26.

In deciding whether the affected speech was government speech or private speech, we borrowed a four-factor test from other circuits that examines: "(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech." *SCV,* 288 F.3d at 618 (internal quotation marks omitted). Applying these factors, we held that the affected speech--the plate design and emblem of the Sons of Confederate Veterans--was private speech. *Id.* at 621. Therefore, we struck down the emblem restriction as viewpoint discrimination against private speech within the specialty license plate forum. *Id.* at 626-27.

The plaintiffs argue that *SCV* controls the present case and dictates a finding of private speech. The State, on the other hand, argues that *SCV* is sufficiently distinguishable to warrant a finding of government speech. The district court did not explicitly apply the four-factor *SCV* test to this case; rather, it interpreted *SCV* as holding that "specialty license plates embod[y] private, not government speech." *PPSC,* 236 F.Supp.2d at 571. In doing so, the district court overlooked an important difference between this case and *SCV*. In *SCV* the Commonwealth of Virginia acted as regulator of the existing specialty license plate forum. In response to a private organization's request for its own plate, the Commonwealth authorized, but modified, the plate to prevent the display of the Confederate flag. In this case, on the other hand, the State acts as a covert speaker within the specialty license plate forum, creating a license plate that promotes one viewpoint in the abortion debate at the expense of another. I draw the following two conclusions from this difference. First, I conclude that applying the *SCV* test to this case produces an indeterminate result, one suggesting that the Choose Life plate embodies a mixture of private and government speech. Second, I conclude that despite the element of government speech on the Choose Life plate, the Act violates the First Amendment. My analysis follows.

I begin by applying the *SCV* test to determine whether the speech at issue can be characterized as either government or private speech. First, I consider the

purpose of the Act. The State argues that the Act's purpose is to promote the State's preference for the pro-life position, and I agree. The plate with the Choose Life message came about through legislative initiative that culminated in a bill that was passed by both houses and signed into law by the Governor. The Act makes the Choose Life plate available to any interested vehicle owner and provides that proceeds from the sale of the plate will be distributed to local pregnancy crisis organizations, but not to family planning organizations that provide or promote abortion services. S.C.Code Ann. § 56-3-8910(B). Unlike in *SCV*, where the purpose of the challenged law was to "produce revenue while allowing ... for the private expression of various views," *SCV*, 288 F.3d at 619, the purpose of the Choose Life Act is specifically to promote the expression of a pro-life viewpoint. The first *SCV* factor therefore weighs in favor of a government speech designation.

When I analyze the second *SCV* factor, the degree of editorial control over the content of the plate, I conclude that here, too, the facts are distinguishable from *SCV*. The *SCV* plate was sought and designed by the plate's private sponsor, the organization itself. *Id.* at 621. Here, the idea for a Choose Life plate originated with the State, and the legislature determined that the plate will bear the message "Choose Life." The State thus exercises complete editorial control over the content of the speech on the Choose Life plate. As a

result, the second factor also weighs in favor of finding government speech.

Finally, I consider the third and fourth factors of the *SCV* test: the "identity of the literal speaker" and "whether the government or the private entity bears the ultimate responsibility" for the speech. *SCV,* 288 F.3d at 621. As to the third factor, I note, as our court did in *SCV,* that the Supreme Court has held that even messages on standard license plates are associated at least partly with the vehicle owners. *Id.* at 621; *Wooley v. Maynard,* 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (holding that vehicle owner had First Amendment right to cover the "Live Free or Die" motto on New Hampshire plate). This association is much stronger when the vehicle owner displays a specialty license plate. Although a specialty license plate, like a standard plate, is state-owned and bears a state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty license plate imprinted with the phrase "Choose Life" would doubt that the owner of that vehicle holds a pro-life viewpoint. The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State, just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker. The same reasoning leads me to conclude (under the fourth *SCV* factor) that the private individual bears the ultimate responsibility for the

speech on the Choose Life plate. Although the Choose Life plate was made available through state initiative, the private individual chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle. The last two *SCV* factors thus weigh in favor of finding private speech.

Although the district court concluded that the speech in this case was private speech under *SCV,* I conclude that *SCV*'s four-factor test indicates that both the State and the individual vehicle owner are speaking. The State speaks by authorizing the Choose Life plate and creating the message, all to promote the pro-life point of view; the individual speaks by displaying the Choose Life plate on her vehicle. Therefore, the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two. *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 244-45 (4th Cir.2002) (suggesting that it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time.") (Luttig, J., respecting the denial of rehearing *en banc*); L. Gielow Jacobs, "Who's Talking? Disentangling Government and Private Speech," 36 *U. Mich. J.L. Ref.* 35, 97 (2002)(observing that specialty license plates contain "a mixture of government and private speech."). Although our analysis in *SCV* anticipated a finding of either government or private speech, our opinion there does not preclude a finding of

mixed speech. *See SCV,* 288 F.3d at 618-19 (acknowledging that the four factors do not "constitute an exhaustive or always-applicable list"). My conclusion that the speech is mixed (both government and private) does not end the discussion, however. I must go on to consider whether the State has engaged in viewpoint discrimination and whether it may engage in viewpoint discrimination when the relevant speech is both government and private.

B.

The State contends only in passing that the Act does not discriminate based on viewpoint. As I have indicated, the State's primary argument is that the license plate message, "Choose Life," is State speech because the Act "is the most recent and apparently most visible expression in a long line of statements asserting the State's clear and oft-repeated preference for childbirth over abortion." Appellants' Br. at 19. The State then argues that even if the Act does affect private speech, it is not discriminatory "because [it] does not affirmatively restrict the expression of plaintiffs' preferred viewpoint." *Id.* at 24. This is the argument the State made in opposition to standing, an argument already rejected in part II, above.

The Supreme Court has made clear that the "principal inquiry" in assessing a claim of viewpoint discrimination "is whether the government has adopted a regulation of speech because of [agreement or]

disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). *See also Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 645, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). A regulation can discriminate based on viewpoint without affirmatively suppressing a certain viewpoint. Discrimination can occur if the regulation promotes one viewpoint above others, *see Rosenberger,* 515 U.S. at 828, 115 S.Ct. 2510, and this is precisely what has happened here.

In the license plate forum, South Carolina has authorized the expression of only one position in the abortion debate, thereby promoting the expression of one viewpoint (pro-life) while preventing the expression of the other viewpoint (pro-choice). By granting access to the license plate forum only to those who share its viewpoint, South Carolina has provided pro-life supporters with an instrument for expressing their position and has distorted the specialty license plate forum in favor of one message, the pro-life message. *See, e.g., Velazquez,* 531 U.S. at 543, 121 S.Ct. 1043; *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95-97, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). In short, as the district court correctly determined, the Act was adopted because of the State's agreement with the pro-life message. *PPSC,* 236 F.Supp.2d at 571. South Carolina has therefore discriminated based on viewpoint. *See Rosenberger,* 515 U.S. at 828, 115 S.Ct. 2510.

C.

I next consider whether the State may engage in viewpoint discrimination when the relevant speech is both government and private. Although the Supreme Court has not yet recognized that speech can be governmental and private at the same time, its decisions on government speech and viewpoint discrimination provide instruction on whether the State's viewpoint discrimination in the license plate forum can stand. *See Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Rosenberger,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700; *Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63. A review of these decisions persuades me that upholding the Act would require an unwarranted extension of the government speech doctrine and of the State's power to promote some viewpoints above others. Although the government may favor certain speech on the basis of viewpoint when it creates and manages its own programs, what South Carolina has done departs from this model in constitutionally significant ways. First, the State has created a limited (license plate) forum for expression, not a government program such as one, for example, that would be carried out through a school, museum, or clinic. Second, the State has favored itself as a speaker within the license plate forum, giving its own viewpoint privilege above others. Third, the State's advocacy of the pro-life viewpoint may not be readily apparent to those who see the Choose Life plate, and this insulates the State's advocacy from electoral

accountability. The government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process.

In *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233, the Court considered regulations restricting the use of funds by grantees under Title X of the Public Health Act, 42 U.S.C. § § 300-300a-6. Title X provided federal funds to clinics that "offer[ed] a broad range of acceptable and effective family planning methods and services," but prohibited the award of funds to clinics with "programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. This meant that doctors at funded clinics could not counsel their patients on abortion matters. When the regulations that prohibited abortion counseling and referral were challenged as viewpoint discrimination, the Court upheld them because they were "designed to ensure that the limits of the federal program are observed." *Rust,* 500 U.S. at 193, 111 S.Ct. 1759. Because the Title X grant program was designed "not for prenatal care, but to encourage family planning," the Court reasoned, "[a] doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such a service is outside the scope of the federally funded program." *Id.* After noting that the regulations were consistent with the statutory prohibition, the Court concluded that Congress had not restricted speech based on viewpoint, but rather had "merely chosen to fund one activity to the

exclusion of another." *Id.* at 193, 111 S.Ct. 1759. The Court further explained that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194, 111 S.Ct. 1759. In *Rust* the Court "did not place explicit reliance on the rationale that the counseling activities of the doctors ... amounted to government speech; when interpreting the holding in later cases, however, [it] ... explained *Rust* on this understanding." *Velazquez,* 531 U.S. at 541, 121 S.Ct. 1043.

Rust stands for the principle that when the government creates and manages its own program, it may determine the contents and limits of that program. *See, e.g., Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510; *Velazquez,* 531 U.S. at 541, 121 S.Ct. 1043. There is no First Amendment problem, for example, when a public school makes content-based decisions about its curriculum, *see Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510, or when a public museum decides to display one work of art as opposed to another, *see* R. Bezanson & W. Buss, The Many Faces of Government Speech, 86 Iowa L.Rev. 1377, 1422 (2001). The government's broad discretion is justified in such instances because "[w]hen the government speaks ... to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). Further, "[i]f the citizenry objects, newly elected officials later could espouse some

different or contrary position." *Id. See also* Robert C. Post, "Subsidized Speech," 106 Yale L.J. 151, 164 (1996) ("Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon."). In short, government speech is necessary to achieve the objectives approved through the ballot box, but the government must remain accountable to the citizenry for what it says. At the same time, as the Supreme Court explains, "[n]either the latitude [allowed] for government speech nor [the] rationale" for that latitude applies to all cases where the government funds speech. *Velazquez,* 531 U.S. at 542, 121 S.Ct. 1043. The Court made this clear in both *Rosenberger* and *Velazquez,* two viewpoint discrimination cases.

In *Rosenberger* a public university established a student activities fund (SAF) to reimburse student organizations for the printing costs of their publications. 515 U.S. at 823, 115 S.Ct. 2510. The SAF was designed to support a broad range of extracurricular activities that related to the university's educational purpose. The university, however, excluded certain student activities, including religious activities, from receiving SAF funds. *Id.* at 824-25, 115 S.Ct. 2510. A Christian student organization that was denied funding for the printing costs of its newspaper challenged the funding exclusion, which the Supreme Court struck down. *Id.* at 825-26, 115 S.Ct. 2510. The Court determined that the university, by establishing the SAF, had created a limited public forum for speech, albeit "a forum more in

a metaphysical than in a spatial or geographic sense." *Id.* at 830, 115 S.Ct. 2510. The university must abide by First Amendment principles, the Court said, "even when the limited public forum is one of its own creation." *Id.* at 829, 115 S.Ct. 2510. Specifically, "[w]hen the government targets ... particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* The Court therefore distinguished government regulation of a limited forum for speech from the typical instance when the State may permissibly promote its viewpoint, such as when it "determines the content of the education it provides" or when (as in *Rust*) it "use [s] private speakers to transmit specific information pertaining to its own program." *Id.* at 833, 115 S.Ct. 2510. In *Rosenberger* the student groups that applied for SAF funding were not speaking for the university; they "[were] not the University's agents, [were] not subject to its control, and [were] not its responsibility." *Id.* at 835, 115 S.Ct. 2510. Therefore, the Court held that the university could not "silence the expression" of the viewpoints of the groups listed as ineligible for SAF funding. *Id.* Though the Court acknowledged that "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created" may justify certain restrictions on its use, it emphasized that those restrictions must be viewpoint neutral and must be reasonable in light of the forum's purpose. *Id.* at 829-30, 115 S.Ct. 2510.

In *Velazquez* the Court invalidated a funding restriction under the Legal Services Corporation (LSC) Act that forbade recipients of LSC funds from arguing for a change in existing welfare law. The funding condition required an LSC-funded lawyer to withdraw from representing a client if it turned out that the representation would involve challenging a welfare law. *Velazquez,* 531 U.S. at 539, 121 S.Ct. 1043. The government, relying on *Rust,* attempted to justify the funding restriction as "necessary to define the scope ... of the federal program." *Id.* at 547, 121 S.Ct. 1043. The Court rejected this justification. It explained that "[t]he lawyer is not the government's speaker" and that when the government regulates a particular medium--lawyer advocacy in that case--the "accepted usage [of the medium must be considered] in determining whether a particular restriction is necessary." *Id.* at 542, 543, 121 S.Ct. 1043. In regulating the advocacy of LSC lawyers, the government had impermissibly attempted to "use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." *Id.* at 543, 121 S.Ct. 1043. The Court further observed that "there is no programmatic message of the kind recognized in *Rust,*" concluding that "[t]his serves to distinguish [the challenged regulation] from any of the Title X program restrictions upheld in *Rust* and to place it beyond any congressional funding condition approved in the past by this Court." *Id.* at 548, 121 S.Ct. 1043.

Based on *Rosenberger* and *Velazquez,* I conclude that in assessing the Act, a court must focus not only on the character of the speech, but also on the nature of the medium. The medium here--the speciality license plate scheme--is more like a limited forum for expression than it is like a school, museum, or clinic. Although the State authorizes the sale of license plates with the Choose Life message, the State does not enlist vehicle owners to convey the imprinted message in the way that employees of a government-funded enterprise are enlisted to carry out the programs of that enterprise. *See Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510 (explaining that the government may selectively favor speech based on viewpoint when it "enlists private entities to convey its own message"). Rather, vehicle owners purchase and display the Choose Life plate because they agree with the message. Thus, because South Carolina has not created a program "of the kind recognized in *Rust,*" it cannot justify the Act as "necessary to define the scope and contours" of the license plate scheme. *Velazquez,* 531 U.S. at 547, 121 S.Ct. 1043. Instead, because the State has established a license plate forum for the abortion debate, it cannot limit the viewpoints expressed in that forum. *See Rosenberger,* 515 U.S. at 835, 115 S.Ct. 2510.

In addition to creating a limited forum for expression, the State has entered that forum as a privileged speaker. South Carolina does not merely approve or deny applications by private organizations for a specialty plate; it has favored its own position by authorizing one

plate for those who share its view and by failing to authorize a comparable plate for those who oppose its view. The State thus acts as a privileged speaker within a forum that it created and controls. The Supreme Court has never suggested that the government speech rationale allows a State to dominate a forum in this way, even one of its own creation.

Moreover, the State's role in promoting the Choose Life message is obscured from the public. When a certain viewpoint dominates a speech forum, it should be clear to the public whether that dominance reflects the prevailing view or whether it results from a government restriction. In this case, the pro-life position exclusively dominates the abortion debate in the license plate forum, but the reason for that dominance is not readily apparent to the ordinary citizen. Those who see the Choose Life plate displayed on vehicles, and fail to see a comparable pro-choice plate, are likely to assume that the presence of one plate and the absence of another are the result of popular choice. Specifically, they are likely to assume that there are pro-life residents in South Carolina, but not pro-choice residents, who seek to express their viewpoint in the license plate forum. The State can thereby mislead the public into thinking that it has already won support for the position it is promoting. This possibility thwarts "the rationale behind the government's authority to draw otherwise impermissible viewpoint distinctions in the government speech context," namely, "the accountability inherent in the political process." *SCV,* 288 F.3d at 618.

It might be argued that South Carolina is not hiding its identification with the message on the Choose Life plate because the General Assembly enacted the statute making the plate available. Voters, of course, can always express their approval or disapproval of legislative action through the political process. But this argument overlooks the fact that continuing transparency is essential to accountability. Given the array of specialty license plates available in South Carolina, a citizen is less likely to associate the plate messages with the State. South Carolina authorizes license plates that express support for, among other things, the National Wild Turkey Federation, S.C.Code Ann. § 56-3-3410; saltwater fishing, *id.* § 56-3-7300; adopting homeless pets, *id.* § 56-3-9600; and NASCAR racing, *id.* § 56-3-8710. The array of choices makes the license plate forum appear increasingly like a forum for private speech. As the citizen becomes less likely to associate specialty plate messages with the State, the State's accountability for any message is correspondingly diminished.

Of course, South Carolina could abolish the Choose Life license plate Act that results in mixed speech and adopt "Choose Life" as its state motto. Then the State's identity as speaker would be readily apparent, and the State would be accountable to the public for its support of a particular position. Residents displeased with the State's position could register their displeasure through the electoral process. However, precisely because this is a case of mixed speech, and the identity of the

speaker of the Choose Life message is likely to be unclear to viewers of the license plate, government accountability is diminished. South Carolina has placed itself in a position to advocate for a political position while disguising its advocacy as that of private vehicle owners. *See* Jacobs, *supra* at 56-57. ("While the interest of private individuals in speaking anonymously may outweigh listeners' interest in knowing who they are, this same balance does not apply when the government speaks. [The government] can skew the speech market and the basis of its political support in unaccountable ways.") Thus, the State both amplifies the pro-life message and evades scrutiny for its action. Therefore, I conclude that South Carolina has impermissibly favored the pro-life viewpoint by authorizing the Choose Life plate.

I should point out that this result does not render South Carolina powerless to regulate its specialty license plate forum. Because license plates are publicly displayed and issued by the State, certain restrictions on speech within this forum are reasonable and permissible. *Velazquez,* 531 U.S. at 543, 121 S.Ct. 1043; *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 687, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). For instance, the State may consider content in deciding whether to authorize issuance of a particular plate and may, for example, prohibit patently offensive speech from appearing on license plates. *See, e.g., Perry v. McDonald,* 280 F.3d 159 (2d Cir.2001) (upholding Vermont's restriction on offensive scatological terms on

vanity plates as viewpoint neutral and reasonable). But South Carolina has not prohibited patent offensiveness here. The State has opened a limited forum for expression, then entered that forum as a covert but dominant speaker, advocating for one viewpoint in the abortion debate without political accountability and without authorizing the expression of the opposing viewpoint. By limiting access to a specialty license plate to those who agree with its pro-life position, the State has distorted the forum in favor of its own viewpoint. This it may not do. *See, e.g., Mosley,* 408 U.S. at 95, 92 S.Ct. 2286. In sum, South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate, and it has insulated itself from electoral accountability by disguising its own pro-life advocacy. This is prohibited by the First Amendment.

IV.

The Act authorizing the Choose Life plate in South Carolina violates the First Amendment. Accordingly, the district court's judgment invalidating the Act is affirmed.

AFFIRMED

LUTTIG, Circuit Judge, concurring in the judgment:

Based upon the reasoning and conclusions set forth in my opinion respecting the denial of rehearing *en banc* in *Sons of Confederate Veterans v. Commissioner of the*

Virginia Department of Motor Vehicles, 305 F.3d 241, 244 (4th Cir.2002), I concur in the judgment reached today. In *Sons of Confederate Veterans*, I outlined what I believed were the factual and doctrinal necessities for recognition that some speech acts constitute both private and government speech, notwithstanding that the Supreme Court of the United States had not at that time (and as yet has not) recognized that a single communicative event may be both private speech and government speech. *See id.* at 244-47. I concluded in that case that vanity license plates are quintessential examples of such hybrid speech. While recognizing that different circumstances may present themselves even in the single context of the vanity license plate, I explained my view that at least where the private speech component is substantial and the government speech component less than compelling, viewpoint discrimination by the state is prohibited.

I expressed the expectation in *Sons of Confederate Veterans* that, when the opportunity arose, this court would further refine its views on the important question of whether a single communicative event can be both private and government speech. Needless to say, I am pleased that the court adopts today the view that speech can indeed be hybrid in character. I believe that, with time, recognition of this external and legal fact will be a contribution to the law, even if different questions must now be resolved over the implications of such a holding.

I am pleased in particular that Judge Gregory, who also wrote in dissent from denial of rehearing *en banc* in *Sons of Confederate Veterans,* 305 F.3d at 252, concurs in the judgment reached today, for I understood him to take a different position in his opinion in that case than the one he takes today. In *Sons of Confederate Veterans,* in an analysis which, if applied here, would *permit* the State of South Carolina to *exclude* the pro-choice message, he reasoned that the First Amendment *permitted* the Commonwealth of Virginia to *exclude* the Confederate flag from the state's license plates, because the Commonwealth of Virginia bore the "ultimate responsibility" for the speech at issue, *id.* at 251 n. 2; the Commonwealth had a substantial interest in not being compelled to speak by private citizens, *id.* at 252, being no differently postured in this regard than the "objecting drivers in *Wooley v. Maynard,*" *id.* at n. 4 (citation omitted); the "predominate concern that motivated [the Commonwealth's] enactment" of the statute excluding the Confederate flag was to avoid "speech by attribution," *id.* (citation omitted), which he believed to be a "substantial government interest," *id.* at 252; and there remained open "reasonable alternative avenues" for communication of the excluded message. *Id.* I had been concerned that Judge Gregory would have believed himself bound by his reasoning in *Sons of Confederate Veterans* to come to a different conclusion than does he and the court today, and to hold that the State of South Carolina may, permissibly under the First Amendment, exclude the pro-choice message

from its license plates because of the state's expressed interest in avoiding association with that message.

Judge Gregory found the panel's opinion deficient in *Sons of Confederate Veterans* in large part because of its "cursory" examination of the factors bearing on the question of whether speech is that of the government or that of private individuals. *Id.* at 251; *see also id.* (describing panel's application of test as "incomplete at best"). In particular, he believed that "there [was] more to be said about the test, including how the factors relate to each other, and the relative weight to be given each factor." *Id.* Judge Gregory does not identify the test that he would apply or explain the details as to how he believes that test would be applied in this case. I infer from his concurrence, however, that he no longer holds to the views expressed in his opinion in *Sons of Confederate Veterans,* and that he has continued to refine his thinking on the difficult issues presented in this case and in *Sons of Confederate Veterans,* as have I and the other members of the court.

GREGORY, Circuit Judge, concurring in the judgment:

In *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 288 F.3d 610, 613 (4th Cir.2002), this Court was asked to determine whether the State of Virginia had a right to disassociate itself from what many Americans, of all races and nationalities, view to be a symbol of racism and slavery--the Confederate flag--by prohibiting the Sons

of Confederate Veterans ("SCV") from displaying their organizational logo, which includes the Confederate flag, on state owned and state issued license plates. The panel hearing the case, in a unanimous decision, held that Virginia did not have such a right. *Id.* at 614, 627. To reach this holding, the panel concluded, incorrectly in my view, that only private speech was implicated by Virginia's vanity license plate program. *Id.* at 618-21. Having so concluded, the panel held that Virginia's attempt to balance its interest of not being associated with a highly divisive and controversial symbol with the interest of the SCV in having an organizational license plate amounted to viewpoint discrimination and was therefore unconstitutional. *Id.* at 622-27.

In a six to five vote, this Court declined to rehear the case *en banc*. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 242 (4th Cir.2002)(denying rehearing *en banc*). In dissenting from that decision, I expressed my belief "that the panel did not fully and adequately analyze the 'government speech' aspect of [the] case." *Id.* at 251 (Gregory, J., dissenting from the denial of rehearing *en banc*). In doing so, I noted that "[w]hat is, and what is not, 'government speech' is a nebulous concept, to say the least," *id.*, because there is a "blurry and sometimes overlapping line between private and government speech." *Id.* at 252. I believe this is especially true with "license plate programs [because they] .:. really have elements of both private *and* government speech." *Id.*

Thus, while I continue to believe that *Sons of Confederate Veterans* was wrongly decided, I am constrained to follow it because it is the law of this Circuit. Accordingly, because I believe the judgment reached today applies the factors set forth in *Sons of Confederate Veterans* in a manner that begins to recognize the government speech interests that are implicated in the vanity license plate forum, I concur in the judgment.

Appendix C

United States District Court for the District of South Carolina Opinion and Order Dated December 26, 2002

United States District Court,
District of South Carolina,
Charleston Division.

PLANNED PARENTHOOD, et al., Plaintiffs
v.
Boykin ROSE, et al. Defendants

No. 2-01-3571-23.

Dec. 26, 2002

Michael P. O'Connell, Stirling O'Connell and Pennington, Charleston, SC, Peter L. Murphy, Columbia, SC, Roger Evans, Carrie Y. Flaxman, New York, NY, for Plaintiff.

Treva G. Ashworth, John W. McIntosh, Kenneth Paul Woodington, Tracey Colton Green, SC Attorney General's Office, Columbia, SC, Charles Molony Condon, Office of Attorney General, Columbia, SC, for Defendants.

OPINION AND ORDER

BERTELSMAN, Senior District Judge.[1]

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[1]Hon. William O. Bertelsman, Senior United States District Judge for the Eastern District of

This case arises out of a dispute regarding the constitutionality of a South Carolina statute authorizing the issuance of special motor vehicle license plates bearing the words "Choose Life."

Before the court are the parties' cross-motions for summary judgment. The court heard oral argument on these motions on November 22, 2002.

The matter having been taken under submission, the court now issues the following opinion addressing the merits of the controversy.

STATEMENT OF FACTS

A. The South Carolina "Choose Life" License Plate Statute.

In 2001, the South Carolina General Assembly enacted Section 56-3-8910 of the Code of Laws of South Carolina ("the Act"). The Act requires the Department of Public Safety ("DPS") to issue special motor vehicle license plates with the words "Choose Life" to interested vehicle owners.[2]

Kentucky, sitting by designation.

[2]The DPS must first receive 400 pre-paid applications for the special plate, or a deposit of $4,000 from an interested individual or organization, before it may begin production and distribution of the plates.

The fee for a "Choose Life" plate is $70 every two years, in addition to the regular license fee. S.C. CODE ANN. § 56-3-8910(A) (Law. Co-op 2002). Proceeds from the sale of the plates are to be deposited into a special account administered by the state Department of Social Services ("DSS"). S.C. CODE ANN. § 56-3-8910(B). Local private non-profit organizations that provide "crisis pregnancy" programs may apply for grants from this special fund. *Id.* However, grants may not be awarded to "any agency, institution, or organization that provides, promotes, or refers for abortion." *Id.*

The legislation that ultimately gave rise to the "Choose Life" special license plate statute was promoted in the South Carolina legislature by state Senator Michael L. Fair. (Affidavit of Michael Fair ¶ ¶ 4, 8) (attached to Doc. # 42) Fair championed the "Choose Life" license plate legislation on his own initiative; it was not the result of any formal petition by anyone seeking the issuance of such a plate. *Id.* ¶ 6.

B. South Carolina's Alternative License Plate Program.

A separate, and preexisting, South Carolina statute permits nonprofit organizations to apply for license plates promoting their group. *See* S.C. CODE ANN.

S.C. CODE ANN. § 56-3-8910(C).

§ 56-3-8000. This organizational plate scheme differs in various respects from the "Choose Life" scheme. For example, while the "Choose Life" plates were created and "preapproved" by a special act of the state legislature, nonprofit organizations desiring a plate for their group must apply to the DPS. *Id.* Organizational applicants must submit proof of the group's nonprofit, tax-exempt status; 400 prepaid applications or a $4,000 deposit; camera-ready artwork; and a marketing plan for the sale of the plate which must be approved by the DPS. *See* Form DMVB-21, "Application for Non-Profit Organization Plate," *available at* http://www.scdps.org/dmv/forms (last visited Dec. 18, 2002). Such plates may bear only the "emblem, seal or other symbol" of the organization that the Department of Public Safety. S.C. CODE ANN. § 56-3-8000(A). The DPS may "alter, modify, or refuse to produce" any organizational plate that "it deems offensive or fails to meet community standards." S.C. CODE ANN. § 56-3-8000(H).

In addition, while "Choose Life" special license plates are available to any individual who owns a private passenger vehicle registered in South Carolina, organizational plates are available only to certified members of the non-profit organization. S.C. CODE ANN. § 56-3-8000(D).

Finally, Title 56 of the South Carolina Code authorizes literally dozens of other specialty vehicle license plates, some contingent upon organizational membership and

some not. *See, e.g.,* S.C. CODE ANN. § 56-3-3310 (Purple Heart recipient plate); § 56-3-3410 (National Wild Turkey Federation); § 56- 3-3710 (college and university plates); § 56-3-3950 ("Keep South Carolina Beautiful"); § 56-3-5200 ("First in Golf"); § 56-3-5350 (Normandy invasion survivor plate); § 56-3-7610 (Square and Round Dancers); § 56-3-7860 (Shriners); § 56-3-7910 (H.L.Hunley); § 56-3-8200 (Rotary International); § 56-3-8600 (Ducks Unlimited); § 56-3-8710 (NASCAR plates). This list is merely illustrative; the Code provides for other specialty plates.

C. The Present Litigation.

Plaintiffs filed this action in September, 2001, in the United States District Court for the District of South Carolina at Charleston. (Doc. # 1)

Plaintiff Renee Carter owns an automobile registered in South Carolina. Carter would like to purchase a special plate for her automobile expressing her view that women should be permitted to choose whether to have an abortion.

Plaintiff Planned Parenthood owns a reproductive health organization that provides services to women in South Carolina. Planned Parenthood also provides first-trimester abortions at its clinics and refers patients for abortions at other facilities.

Defendants are the state officials charged with administering the "Choose Life" license plate program. B. Boykin Rose is the Director of the DPS of South Carolina, the agency charged with processing applications for the plates. Gary D. Maynard is the Director of the Department of Corrections of South Carolina, the department charged with producing the plates. Elizabeth G. Patterson is the Director of the DSS of South Carolina, the department charged with administering the special fund created by fees from sale of the "Choose Life" plates. All individual defendants are sued in their official capacities.

Plaintiffs allege that the Act suffers from a variety of constitutional infirmities: that it infringes the First Amendment by discriminating on the basis of viewpoint and by placing an unconstitutional condition on the exercise of their constitutional rights; that it violates the Fourteenth Amendment by placing an undue burden on Planned Parenthood's patients' rights to choose an abortion; and that it infringes plaintiffs' Fourteenth Amendment rights to equal protection and due process.

On November 20, 2001, United States District Judge Patrick Michael Duffy granted plaintiffs' motion for a preliminary injunction and temporarily enjoined enforcement of the Act. (Doc. # 30) Judge Duffy indicated a willingness to consolidate the preliminary injunction proceeding with a decision on the merits, but defendants requested time for additional briefing. *Id.* at 4 n. 1.

Accordingly, the parties conducted limited discovery and filed the cross-motions for summary judgment that are now ripe for disposition.

After careful consideration, this court has concluded that the plaintiffs have standing to mount a facial challenge to the Act, and that the Act is void on its face because it violates well established First Amendment principles governing public fora and/or the issuance of permits to exercise free speech.

ANALYSIS

1. What this case is not about.

This is a free speech case. It is not about the merits of the ongoing national controversy between the pro-life and pro-choice movements. In another case, in some other court, the position of the parties with regard to some other state's issuance of a license plate could well be reversed.

2. Standing.

The court must first address the issue of standing, because this issue goes to the jurisdiction of the court. If a plaintiff does not have standing, the matter before the court is not a "case or controversy," as required by Article III of the Constitution of the United States for subject matter jurisdiction to exist. *Finlator v. Powers*, 902 F.2d 1158, 1160 (4th Cir.1990).

Defendants cite *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), in support of their argument that plaintiffs lack standing to assert their First Amendment claims.[3] [FN3] There, the Supreme Court lists the following three requisites for standing:

> 1. First, the plaintiff must have suffered an "injury in fact"--- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent.[4]
> 2. Second, there must be a causal connection between the injury and the conduct complained of, i.e., the injury has to be fairly traceable to the challenged action of the defendant.
> 3. Third, it must be likely that the injury will be redressed by a decision favorable to the plaintiffs.

504 U.S. at 560-61, 112 S.Ct at 2136. "In the shorthand analysis of standing, these three basic requirements are

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[3]Because the court finds the resolution of plaintiffs' first cause of action dispositive of the pending motions, it need not reach the merits of their other claims.

[4]Here, the plaintiffs allege they have been denied the ability to have a license plate bearing a symbol or slogan of their choice.

referred to as injury-in-fact, causation and redressability." *Finlator,* 902 F.2d at 1160.

Here, the defendants particularly contend that the third element is lacking. Defendants point out that a decision finding the "Choose Life" statute unconstitutional will not result in the issuance of a license plate expressing a slogan of plaintiffs' choice. Defendants also argue that the case is not "ripe" in that the plaintiffs have not petitioned the legislature for issuance of a plate of their choice.

It appears that the only appellate decision addressing standing in the context of a license plate is *Henderson v. Stalder,* 287 F.3d 374 (5th Cir.2002), *cert. denied,*--- U.S. ----, 123 S.Ct. 602, 154 L.Ed.2d 521 (2002), which adopted these arguments with one judge forcefully dissenting.

Judge Davis's dissent relies first on a firmly established exception to the general rules of standing where First Amendment rights are at issue. In such cases, an expanded rule of standing must be used, especially where the actual or possible exercise of unbridled discretion by public officials is at issue. *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 755-56, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988). The teaching of *Lakewood* has been summarized as follows:

> If a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. *A facial challenge lies whenever a licensing law gives to a government official or agency substantial power to discriminate based on the context or viewpoint of speech by suppressing disfavored speech or disliked speakers.*

15 *Moore's Federal Practice* § 101.61[5][b](ii) (3d ed.2002), (emphasis added) (citing *Lakewood, supra*).

Judge Davis's dissent also relies on another line of Supreme Court cases addressing the "redressability" requirement. In those cases, the Court holds that a person or group excluded from benefits conveyed via an underinclusive statute has standing to challenge the statute on constitutional grounds, even if the effect of striking down the statute is to deny the benefit to the intended group and not extend it to the plaintiffs. *See Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 7-8, 109 S.Ct. 890, 895, 103 L.Ed.2d 1 (1989); *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 227, 107 S.Ct. 1722, 1726-27, 95 L.Ed.2d 209 (1987); *Orr v. Orr,* 440 U.S. 268, 271-73, 99 S.Ct. 1102, 1107-09, 59 L.Ed.2d 306 (1979).

As did the judges of the Fifth Circuit, other courts have disagreed with each other on whether or not a plaintiff has standing to challenge a statute authorizing the issuance of a license plate bearing a slogan or logo that is objectionable to a plaintiff[5].

After careful consideration, this court concludes that standing does exist under the doctrines discussed above whereby enhanced standing is afforded to plaintiffs making facial First Amendment challenges to licensing or underinclusive statutes.

In this regard, the Supreme Court's opinion in *City of Lakewood v. Plain Dealer Publ'g Co., supra,* is noteworthy. In *Lakewood,* the publisher of a newspaper challenged an ordinance which gave the mayor of a city nearly total discretion in granting or denying permits for locating news racks on public property.

Upholding the newspaper's standing to make a facial challenge to the ordinance, the Court observed:

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[5]Recognizing standing: *Henderson v. Stalder,* 112 F.Supp.2d 589 (D.La.2000), *rev'd,* 287 F.3d 374 (5th Cir.2002), *cert. denied,* --- U.S. ----, 123 S.Ct. 602, 154 L.Ed.2d521, 71 U.S.L.W. 3283 (U.S. Dec. 2, 2002); denying standing: *Hildreth v. Dickinson,* No. 99-583- CIV-J-21-A, 1999 U.S. Dist. LEXIS (M.D.Fla. Dec. 22, 1999); *Women's Emergency Network v. Dickinson,* 214 F.Supp.2d 1308 (S.D.Fla.2002).

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, *whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.*

486 U.S. at 756, 108 S.Ct. 2138 (emphasis in original) (quoting *Freedman v. Maryland,* 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1985)).

Pursuant to the above authorities, this court respectfully disagrees with the Fifth Circuit majority in *Henderson v. Stalder, supra.*

Moreover, the Supreme Court's reasoning in those cases has been applied by the Fourth Circuit, whose decisions are binding on this court. *See Chesapeake B & M, Inc. v. Hartford County, MD*, 58 F.3d 1005, 1009-10 (4 th Cir.) (applying *Lakewood* to find that plaintiffs had standing to make facial First Amendment challenge to licensing law), *cert. denied,* 516 U.S. 1010, 116 S.Ct. 567, 133 L.Ed.2d 492 (1995); *Finlator v. Powers,* 902 F.2d 1158, 1161- 62 (4th Cir.1990).

In *Finlator,* the Fourth Circuit held that book purchasers and sellers had standing to challenge the constitutionality of a North Carolina statute exempting

from state tax the proceeds from the sale of Bibles. The state argued that because the plaintiffs had not taken any steps to "ensure" their standing--such as contesting the tax prior to its payment, refusing to pay the tax, paying the tax under protest, seeking a refund, or taking some other action to permit the state to preclude or redress their injuries--they could not show any particularized injury caused by the defendant. The Fourth Circuit rejected this argument, with reasoning that bears quoting at length:

> While there is some justification for the Secretary's interpretation of *Arkansas Writers' Project* and *Texas Monthly*, we decline to read such an implicit requirement into these decisions absent a clear statement by the Supreme Court to that effect. *Realistically, if this court were to deny standing in this case, the appellants would simply protest the payment and collection of the State's sales tax, and refile their suit. We do not believe that this additional requirement would improve the vigorousness or quality of the parties' advocacy, would enhance the posture of this case, would strengthen the justiciability of the appellants' claims, or would contribute in any way to our ability to decide a question presented and contested by parties having a demonstrated interest and stake in its*

> *resolution. Moreover, we conclude that the appellants did suffer actual injury in this case as a result of the discriminatory treatment dispensed by the Secretary--purchasers of "Holy Bibles" need not protest the State's sales tax in order to claim the Exemption, while purchasers of other texts, both sacred and non-sacred, must protest the sales tax in order to claim the Exemption....* Finally, we believe that it would be an untenable waste of judicial resources to deny the appellants standing in this case given the patent unconstitutionality of the Exemption. As noted above, standing is an amalgam of prudential as well as constitutional concerns, but none of the prudential concerns of standing compels the denial of standing in this case.

Id. at 1162 (emphasis added).

Moreover, in the opinion of this court, the Fifth Circuit's view in *Henderson, supra,* does not give sufficient weight to the principle that it is the *threat* of having one's sacred First Amendment rights subjected to arbitrary censorship that constitutes the injury that is the basis of standing in this context:

> The District Court's finding that in this instance the Forsyth County administrator

> applied legitimate, content-neutral criteria, even if correct, is irrelevant to this facial challenge. Facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 2151, 100 L.Ed.2d 771 (1988). "*It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*" *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940). Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 133 n. 10, 112 S.Ct. 2395, 2403 n. 10, 120 L.Ed.2d 101 (1992) (emphasis added).

Further,

> Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas.... The cases ... indicate that the rule [allowing standing for a facial challenge] is *not based on any assumption that application for the license would be refused* .... Rather it derives from an appreciation of the character of the evil inherent in a licensing system.

Thornhill v. Alabama, 310 U.S. at 97, 60 S.Ct. at 741-42 (citations omitted).

Stated differently, "the plaintiffs are injured by the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing view." *Henderson,* 287 F.3d at 387 (Davis, J. dissenting).

In the case now before this court, it is the legislature that has authorized the issuance of a "Choose Life" license plate. This decision, by the nature of the legislative process, was based on the discretion of the legislators, uncontrolled by any standards. Equally significant, the plaintiffs allege that the legislature has selected one viewpoint over all others on a particular topic, permitting it alone expression in a public forum.

Therefore, pursuant to the authorities discussed above, the plaintiffs here have standing to mount a facial challenge to the statute without having applied for the issuance of a license plate bearing a slogan of their own choice.

3. The Merits.
A. Government versus private speech.

The first step in analyzing the merits of plaintiffs' First Amendment claims is to determine whether the speech implicated by the "Choose Life" license plates is "government" or "private" speech. *Sons of Confederate Veterans, Inc. v. Commissioner Of The Virginia Department Of Motor Vehicles,* 288 F.3d 610, 616-17 (4th Cir.2002) (hereafter "*SCV* ").

Defendants argue that the "Choose Life" license plate embodies government speech, rather than private speech. Under this theory the government, of course, would be free to express its own viewpoint on most issues without providing for the expression of contrary views. *Id.*

However, defendants' argument is directly contrary to the recent decision of the United States Court of Appeals for the Fourth Circuit in *SCV.*

In *SCV,* the Fourth Circuit considered a constitutional challenge to a Virginia statute that prohibited display of the logo of the Sons of Confederate Veterans on its

specialty organization license plate. The state argued that any expressive content on the plate was a "statement" by the state of Virginia, not private speech by the organization's members. After setting forth and examining several factors it deemed relevant, the Fourth Circuit concluded that the specialty license plates embodied private, not government, speech. *Id.* at 621.

Therefore, this court must analyze the validity of the statute challenged here under those First Amendment principles applicable to private rather than governmental expression.

B. Forum analysis.

As private expression, plaintiffs' claims may be analyzed on the merits either under First Amendment principles governing licensing or those concerned with access to public fora. Whichever doctrine is invoked, clearly established precedents require that plaintiffs prevail.

Forum analysis examines restrictions placed on private speech that occurs on government property or with government participation. *SCV,* 288 F.3d at 622. The three fora recognized are: (1) traditional public fora, such as streets, parks, and sidewalk; (2) designated public fora; and (3) nonpublic fora. *Id.* at 623 n. 10 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). The latter two types of fora are created when

the government grants access to property or resources to private speakers. *Id.*

While the government's ability to regulate private speech depends in part on the type of forum involved, viewpoint discrimination is presumed impermissible in any forum under any analysis. *Id.* at 622 (citing *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Thus, the type of forum that exists is relevant only if the restriction is viewpoint neutral. *Id.* at 623.

Defendants do not contend that the "Choose Life" phrase is viewpoint neutral. Indeed, they affirmatively state that the "Choose Life" license plate "is the most recent and apparently most visible manifestation of the State's clear and oft-repeated preference for childbirth over abortion." (Cross-Motion for Summary Judgment at 17) (Doc. # 42) *See also Hildreth v. Dickinson* No. 99- 583-CIV-J-21-A, 1999 U.S. Dist. LEXIS 22503, at *7 (M.D.Fla. Dec. 22, 1999) (" 'Choose Life' is a slogan which is generally associated with a social, religious, or political view which espouses the sanctity of human life and encourages adoption in lieu of abortion.").

In *SCV, supra,* the Fourth Circuit employed forum analysis in the scrutiny of a special license plate. There, a statute granted members of the Sons of Confederate Veterans organization the right to have issued to them a special license plate. The statute specifically provided,

however, that no "logo or emblem of any description shall be displayed or incorporated into the design of license plates issued under this section." 288 F.3d at 613. Apparently, the legislature wished to prevent the inclusion of a Confederate flag on the special plate. *Id.* at 623.

The court observed that the General Assembly of Virginia had "created a program through which 'special' Virginia license plates may be issued to members and supporters of various organizations or groups." *Id.* at 614. Numerous special license plates had been authorized at the behest of various groups and organizations pursuant to such statutes. Only the Sons of Confederate Veterans had been forbidden to have their logo on their special plate, however.

The court held that the special license plate program in effect created a public forum and that the prohibition of a logo to one organization accessing that forum was viewpoint discrimination. *Id.* at 626-27. The court reasoned:

> In the realm of private speech or expression, government regulation may not favor one speaker over another. Similarly, "[t]he government must abstain from regulating speech when the motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Thus, where an

> evaluation of a given restriction and the surrounding circumstances indicates that one or more speakers are favored over others, and further that the basis for the restriction is in fact the message the disfavored speaker seeks to convey, the restriction violates the First Amendment. Moreover, where restrictions or regulations of speech discriminate on the basis of the content of speech, there is an "inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion ..."-in other words, to exercise viewpoint discrimination.

Id. at 624 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (citation omitted) and *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)).

On the basis of these clear and well-established principles, this court must conclude that the statute at issue here is a clear manifestation of viewpoint discrimination. "Choose Life" is preferred over whatever motto or slogan the plaintiffs might employ to promote their point of view.

Therefore, because defendants have failed to articulate any compelling government interest for the statute at issue, or to otherwise rebut the presumption of unconstitutionality that attaches to such viewpoint discrimination, plaintiffs are entitled to summary judgment on their claim that the statute violates the First Amendment under a public forum analysis. *Id.* at 626, 114 S.Ct. 2445.

C. Licensing Analysis.

A licensing analysis is closely tied to the public forum analysis in part B by the First Amendment's abhorrence of the exercise of viewpoint discrimination in the regulation of private speech by government officials.[6] In the licensing context, the threat of such discrimination arises from the lack of standards, opening the door to the exercise of uncontrolled discretion. In the forum context, viewpoint discrimination can result from the application of standards which prefer one viewpoint over another.

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[6]A recent opinion of the Seventh Circuit contains a thoughtful discussion of the relationship between the "unbridled discretion" standard enunciated by the Supreme Court in the licensing context and the First Amendment's "viewpoint neutrality" mandate generally encountered in the public forum context. *See Southworth v. Board of Regents of the University of Wisconsin System,* 307 F.3d 566, 575-80 (7th Cir.2002).

The same licensing case precedents which gave the plaintiffs enhanced First Amendment standing also require this court to hold that the Act is void on its face.

Fewer principles are better established in First Amendment law than the principle that exercise of the right of free speech may not be subjected to the unlimited discretion of public officials:

> *[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. E.g.,Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Staub v. City of Baxley,* 355 U.S. 313, 321-22, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Saia v. New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) .... [T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused....
>
> As we said in *Thornhill:* ... "The power of the licensor ... is pernicious not merely by reason of the censure of particular

> comments but by the reason of the *threat to censure comments on matters of public concern."*

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. at 757, 108 S.Ct. at 2144 (emphasis added in part) (quoting *Thornhill v. State of Alabama,* 310 U.S. at 97, 60 S.Ct. at 741-42).

Thus, in a recent articulation of the doctrine based on the above free speech principles, the Supreme Court held:

> [A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth,* 394 U.S. at 150-51, 89 S.Ct. at 938; see also *Niemotko v. Maryland,* 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951). The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion" by the licensing authority, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted.

Forsyth County v. Nationalist Movement, 505 U.S. at 134, 112 S.Ct. at 2401-02 (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940) and *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975)).

Many other cases and authorities support this fundamental principle.[7]

Pursuant to these authorities, this court must conclude that the statute before it is void. The "Choose Life" license plate was issued pursuant to the uncontrolled discretion of the legislature, which was free to, and

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[7]*See Thomas v. Chicago Park Dist.,* 534 U.S. 316, 323, 122 S.Ct. 775, 780, 151 L.Ed.2d 783 (2002); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,* 58 F.3d 988, 994 (4th Cir.), *cert. denied,* 516 U.S. 1010, 116 S.Ct. 567, 133 L.Ed.2d 492 (1995); *Chesapeake B & M, Inc. v. Harford County,* MD, 58 F.3d 1005, 1009-10 (4th Cir.), *cert. denied,* 516 U.S. 1010, 116 S.Ct. 567, 133 L.Ed.2d 492 (1995); CHESTER JAMES ANTEAU, MODERN CONSTITUTIONAL LAW, § 3.07 (1997); 4 RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE, § 20.46 (3d ed.1999); *cf. Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (vagueness doctrine).

undoubtedly did, approve a license plate with a slogan popular with its constituents. Indeed, this is the nature of the legislative process. Defendants here make no argument that the fact that it is the legislature, rather than a state official, that has exercised the standardless discretion to issue the plate lends that exercise legitimacy.

Nor could they. In *SCV,* the license plate logo restriction was held void in part because of viewpoint discrimination by the legislature itself. 288 F.3d at 626. *See also* Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates,* 53 FLA. L. REV. 419, 472 (2001).

As in SCV, violation of First Amendment principles by the legislature renders the statute void.

. *CONCLUSION*

This decision does not deny Right to Life advocates the opportunity to have their own South Carolina license plate. They need only use the alternate licensing program, which vests the decision to issue a desired specialty plate in an administrative official acting pursuant to specified standards. That program appears,

at least on its face, to be viewpoint neutral.[8] Plaintiffs or others who agree with them may utilize that scheme as well.

There are inherent problems with the state legislature issuing special plates on an *ad hoc* basis. As one commentator has observed:

> The current legislatively-run specialty plate programs mix two constitutionally inconsistent commands. The first is for legislators to enact laws that reflect the majority interests and values. The second is for them to administer a private speech forum in a way that does not discriminate according to viewpoint. The conflicting mandates render it almost certain that the administration of a private speech forum by the legislature will result in viewpoint discrimination. The legislature's broad discretion to enact or fail to enact laws based upon its perception of the public interest make it almost impossible for courts to determine if the constitutionally

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[8]This alternate statute is not before the court and no ruling is made thereon. Nor does this court express any view on the funding issue presented by the Act, which the court need not review.

> prohibited viewpoint discrimination has occurred.
>
> These observations lead to the conclusion that a legislature cannot constitutionally run a private speech forum. Of course states can choose to make specialty license plates available to their citizens. To do so, however, they must remove administration of the program from the legislature. With clear, non-viewpoint discriminatory standards, administered consistently by an entity subject to meaningful judicial review, a specialty license plate program can meet the Constitution's free speech guarantee.

Jacobs, *supra,* at 473.

ORDER

Therefore, for the reasons stated herein, it is hereby **ORDERED** as follows:

(1) that defendants' motion for summary judgment (Doc. # 43) be, and is hereby, **DENIED**;

(2) that plaintiffs' motion for summary judgment (Doc. # 36) be, and is hereby, **GRANTED**; and

(3) that Section 56-3-8910 of the Code of Laws of South Carolina be, and is hereby, declared unconstitutional under the Constitution of the United States of America for reasons stated in this opinion.

A separate judgment shall enter in plaintiffs' favor.

JUDGMENT

Pursuant to the Opinion and Order entered concurrently herewith, and the court being advised,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

(1) That Section 56-3-8910 of the Code of Laws of South Carolina be, and is hereby, **declared to be in violation of the Constitution of the United States of America** and 42 U.S.C. § 1983;

(2) That defendants B. Boykin Rose, Gary D. Maynard, Elizabeth G. Patterson, and their officers, agents, servants, employees and attorneys be, and are hereby, **permanently enjoined** from all activities related to the enforcement of Section 56-3-8910 of the Code of Laws of South Carolina, including, but not limited to, taking applications or deposit monies for the "Choose Life" specialty plates, manufacturing the plates, or issuing the plates; and

(3) That this matter be, and is hereby, **dismissed and stricken** from the docket of this court, at the cost of the defendants.

(2)

No. 04-429

Supreme Court, U.S.
FILED
DEC 22 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

B. BOYKIN ROSE, ET. AL.,

Petitioners,

—v.—

PLANNED PARENTHOOD HEALTH SYSTEMS, INC., D/B/A PLANNED PARENTHOOD OF SOUTH CAROLINA; AND RENEE CARTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly hold that Plaintiffs have standing to raise a viewpoint discrimination claim under the First and Fourteenth Amendments to the United States Constitution, where they challenge the discriminatory treatment they suffered when South Carolina authorized a special "Choose Life" automobile license plate and refused to authorize a similar "pro-choice" license plate?

2. Did the Fourth Circuit correctly hold that, when South Carolina authorized a special license plate with the message "Choose Life," which could be purchased for an extra fee by motor vehicle owners wishing to express that view, and South Carolina refused to authorize another special license plate with a "pro-choice" message, South Carolina violated the First Amendment rights of those who seek to communicate the latter message on their license plates?

LIST OF PARTIES

Petitioners: (1) B. BOYKIN ROSE, in his official capacity as the Director of the Department of Public Safety of the State of South Carolina;

(2) JON E. OZMIT, in his official capacity as the Director of the Department of Corrections of the State of South Carolina;

(3) KIM S. AYDLETTE, in her official capacity as the Director of the Department of Social Services of the State of South Carolina.

Respondents: Both respondents are listed in the case caption.

Planned Parenthood Health Systems, Inc., d/b/a Planned Parenthood of South Carolina, is the only Respondent that is a corporation. It does not have a parent corporation, nor is it owned in any part by a publicly held company.

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STATEMENT OF THE CASE

In 2001, South Carolina enacted legislation (the "Act") authorizing the issuance of a special motor vehicle license plate bearing the message, "Choose Life." The Act directed the Department of Public Safety to produce the plate after it received 400 prepaid applications or a deposit of $4000 from an interested individual or organization. S.C. Code Ann. § 56-3-8910(C). The Act provided that the fee for the special plate is seventy dollars every two years in addition to the regular registration fee. *Id.* at § 56-3-8910(A). The Act directed that revenue from the sale of the "Choose Life" plate be used to award grants to nonprofit organizations that provide "crisis pregnancy services,"[1] but not to any organization that "provides" or "refers for" abortions. *Id.* at § 56-3-8910(B).

During the legislative process leading to passage of the Act, a representative of one of the Plaintiffs sought authorization for a comparable plate with a "pro-choice" message in a subcommittee hearing in the South Carolina House of Representatives. Her request was not acted upon, and the bill then before the subcommittee never reached a floor vote. Then, at the end of the same legislative session, a bill authorizing a different special license plate was amended to include the Act. That amended legislation passed both houses of the legislature, and became law.[2]

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[1] The Act does not define this term.

[2] South Carolina has a different, administrative process, by which nonprofit organizations may obtain approval to have a license plate that displays the organization's "emblem, seal, or other symbol." However, these plates may only be sold to certified members of the organization. They may not be sold to any automobile owner who desires to display the message carried on the plate. S.C. Code Ann. § 56-3-8000.

Plaintiffs are an individual owner (Carter) of an automobile registered in South Carolina and a non-profit organization (Planned Parenthood Health Systems, Inc., d/b/a Planned Parenthood of South Carolina ("Planned Parenthood")) that provides reproductive health services, including abortions and abortion referrals, in South Carolina. Planned Parenthood also engages in public advocacy to protect access to all reproductive health services, including abortion.

Plaintiffs filed this civil action in the United States District Court for the District of South Carolina shortly after the Act went into effect. Plaintiffs sought a judgment declaring that—by authorizing a special license plate with the "Choose Life" message for purchase by automobile owners seeking to express that message, and declining to authorize a special license plate with a "pro-choice" message—South Carolina had violated rights secured to Plaintiffs under the First and Fourteenth Amendments.[3] Plaintiffs also sought appropriate injunctive relief.

The district court granted Plaintiffs' motion for a preliminary injunction, and subsequently granted summary judgment to Plaintiffs, finding that the Act violated the First Amendment, and that Plaintiffs have standing to challenge the Act on that ground. Pet. App. 70a, 81a, 86a, 90a.

On appeal, a unanimous panel of the Fourth Circuit affirmed the district court's judgment. On the standing

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[3] Plaintiffs also sought a declaratory judgment that the provision of the Act that disqualified Planned Parenthood from eligibility for funds generated by the sale of the plates, solely because Planned Parenthood provides and refers for abortions, violated Planned Parenthood's and its patients' rights under the First and Fourteenth Amendments. However, as the case was disposed of on the challenge to the authorization of the plates, this claim was never reached.

question, in the opinion that included the judgment of the Court, Judge Michael concluded that Plaintiffs had suffered actual injury—"discriminatory treatment"—due to South Carolina's opening the license plate forum to allow private citizens to express the "Choose Life" viewpoint, while excluding motor vehicle owners such as Plaintiff Carter from using the same forum to express a different viewpoint. Pet. App. 34a. Judge Michael also concluded that striking down the Act would afford Plaintiffs equal treatment in the license plate forum and thereby redress Plaintiffs' injury. Pet. App. 35a-36a.

On the merits, Judge Michael applied a four-factor test previously used by the Fourth and other circuits to determine whether the "Choose Life" message was government speech or private speech. He concluded that two factors—the central purpose of the plate, and the relative degrees of editorial control exercised by the government and the citizen—weighed in favor of the message being government speech, while the remaining two factors—the identity of the literal speaker, and who bears ultimate responsibility for the content of the speech—weighed in favor of the message being private speech.[4] Thus, Judge Michael concluded that the "Choose Life" plate was a mixture of both government speech and private speech. Pet. App. 41a-46a.

Noting that "[t]he State contends only in passing that the Act does not discriminate based on viewpoint," Judge Michael next concluded that the Act was viewpoint discriminatory. Pet. App. 46a. "In the license plate forum, South Carolina has authorized the expression of only one position in the abortion debate, thereby promoting the expression of one viewpoint (pro-life) while

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[4] The district court applied the same four-factor test and concluded that the "Choose Life" license plate is solely private speech. Pet. App. 82a. Plaintiffs believe that this is the correct conclusion.

preventing the expression of the other viewpoint (pro-choice)." Pet. App. 47a.

Finally, Judge Michael concluded that, in spite of the presence of some element of government speech mixed-in with the private speech, this viewpoint discrimination was unconstitutional. Judge Michael cited several considerations that led him to that conclusion. First, he noted that the specialty plates were more like a speech forum than the situations, such as a government-funded program, where this Court has applied the government speech doctrine to reject a viewpoint discrimination claim. Pet. App. 48a-54a. "[T]he State does not enlist vehicle owners to convey the imprinted message in the way that employees of a government-funded enterprise are enlisted to carry out the programs of that enterprise. . . . Rather, vehicle owners purchase and display the Choose Life plate because they agree with the message." Pet. App. 54a. Next, he noted that, by allowing only the "pro-life" message in the license plate forum, South Carolina was not just engaging in viewpoint discrimination, but was "favor[ing] its own position" by authorizing only a plate for those who share its view. Pet. App. 54a-55a. Finally, he observed that this allowed the State to create the impression, at least as far as messages on license plates are concerned, that one viewpoint dominates the debate, and obscured the State's role in creating this impression. Pet. App. 55a-57a.

For all of these reasons, Judge Michael concluded that upholding South Carolina's viewpoint discrimination would "require an unwarranted extension of the government speech doctrine." Pet. App. 48a.

Judges Luttig and Gregory concurred with Judge Michael in separate opinions. Pet. App. 58a-63a.

Subsequently, the panel denied South Carolina's request for rehearing, and by a vote of 8 to 5, the Fourth Circuit denied South Carolina's petition for rehearing *en banc*. Pet. App. 3a.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied.

On the standing issue, the Fourth Circuit's conclusion is not in conflict with the standing ruling in the Fifth Circuit case, *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002), *cert. denied*, 537 U.S. 1048 (2002), or the Eleventh Circuit case, *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003). Even if there is a limited, indirect, conflict with the Fifth Circuit's decision, the standing ruling in the Fifth Circuit case did not dispose of that litigation, and that litigation continues. Any conflict, therefore, with the Fifth Circuit on the standing question is insignificant and does not warrant review.

On the substantive merits of the dispute, South Carolina's petition reduces to a simple disagreement over the Fourth Circuit's application of a legal standard, which South Carolina has not challenged, to conclude that the "Choose Life" license plate involves private speech. That issue does not present a question of federal law of sufficient importance to merit certiorari. Moreover, there is no conflict among the circuits or, indeed, even among the district courts that have considered the nature of the speech, and the permissibility of viewpoint discrimination, when a state authorizes a message to be communicated on its license plates by individual automobile owners who choose to pay an extra fee for a plate with that message.

Therefore, on the standing question, there is, at most, only an indirect conflict between the Fourth Circuit's holding and a holding of the Fifth Circuit, and the Fifth Circuit's holding did not resolve that litigation. On the substantive merits of the Fourth Circuit holding, there is neither an important question of federal law, nor any conflict with any federal court. Under these circumstances, there is no reason for this Court to grant certiorari.

I. REVIEW IS NOT WARRANTED ON THE STANDING ISSUE BECAUSE THERE IS NO CIRCUIT CONFLICT ON AN "IMPORTANT MATTER."

South Carolina contends that certiorari is warranted on the issue of Plaintiffs' standing because the Fourth Circuit's decision is in "direct conflict" on an "important matter" of federal law with the decisions of the Fifth and Eleventh Circuits in *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002) and *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (hereinafter "*WEN*"). South Carolina is mistaken.

First, there is no conflict between the Fourth Circuit's decision and the Eleventh Circuit's decision in *WEN* because the circumstances in *WEN* were very different. In Florida—unlike South Carolina—a specialty plate may be authorized by the legislature only after the organization seeking the plate has completed a formal application process. Fla. Stat. Ann. § 320.08053.[5] The

[5] That process requires the submission of a written request, a scientific survey indicating that at least 15,000 owners would purchase the plate, an application fee, and a marketing strategy describing marketing plans for the plate and outlining the anticipated revenues and planned expenditures of the revenues generated by the plate. *See* Fla. Stat. Ann. § 320.08053(1).

WEN plaintiffs never filed a formal application. *WEN*, 323 F.3d at 946. Thus, the Eleventh Circuit concluded that the *WEN* plaintiffs lacked standing to challenge Florida's "Choose Life" statute because they had not suffered any discriminatory treatment. Discriminatory treatment could arise in Florida only if the Florida legislature had rejected a properly filed application for a "pro-choice" license plate. *Id.* at 946-47. ("The State of Florida has not denied Appellants access to the specialty license plate forum. It has not rejected Appellants' application for a specialty license plate, and it has not applied Fla. Stat. § 320.08053 in a discriminatory manner. Until it does so, Appellants . . . lack standing to bring their claim.").[6]

By contrast, South Carolina has no formal application process. Instead, specialty license plates with messages such as "Choose Life" are authorized by legislation at the sole discretion of the legislators. As the Fourth Circuit noted, the statutory authorization for the "Choose Life" license plate "came about because of the perseverance of two legislators who were acting on their own initiative." Pet. App. 32a.[7] Having authorized one view-

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[6] Judge Shedd was, therefore, off-target in his opinion dissenting from the denial of rehearing *en banc* when he stated that the Eleventh Circuit "found standing lacking even where the plaintiffs had attempted, but failed, to obtain enactment of a statute authorizing "pro-choice" specialty plates." Pet. App. 11a n.3. A Florida Senator had offered an amendment that would have created a "pro-choice" specialty license plate, but there was no formal application for that license plate as required by Florida law. *WEN*, 323 F.3d at 941.

[7] The license plates authorized by S.C. Code Ann. § 56-3-8000 for nonprofit organizations are different. *See* note 2 *supra*. Judge Michael's opinion properly notes that Plaintiffs' failure to apply for an organizational plate is "not fatal to their standing" because "such a plate would not allow an expression that is equivalent to the Choose Life plate." Pet. App. 38a.

point on the abortion debate to speak on specialty license plates, South Carolina acted discriminatorily when, in spite of a request for a license plate with the opposing viewpoint, it excluded that other viewpoint.

Second, the Fourth Circuit's conclusion on standing does not directly depart from the Fifth Circuit's *Henderson* decision because the injury alleged there was different than the injury alleged by Plaintiffs. According to the Fifth Circuit, the plaintiff there alleged that her injury was the "den[ial of] the opportunity to express her pro-choice point of view," *Henderson*, 287 F.3d at 381. The Fifth Circuit concluded that this injury was not redressable because, even if the court declared the Louisiana law unconstitutional, that would not provide the plaintiff there with the forum she sought to express her views. *Id.*

Here, by comparison, the Fourth Circuit found that Plaintiffs' allegation of injury—the "discriminatory treatment they suffer from the State's use of the license plate forum to promote one political viewpoint (pro-life) in the debate about abortion," Pet. App. 34a[8]—was capable of redress by striking down the Act. As Judge Michael explained, "plaintiffs in discrimination cases may seek equal treatment in the form of a level playing field, regardless of whether this is achieved by extending benefits to the disfavored group or by denying benefits to the favored group." *Id.* This holding is consistent with many decisions of this Court. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Heckler v. Matthews*, 465 U.S. 728, 738 (1984); *Regents*

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[8] *See also* Pet. App. 36a: "[T]his case is not about people seeking to obtain license plates bearing the messages of their choice; it is about whether, by enacting the Choose Life Act, the State had impermissibly favored one viewpoint over another."

of University of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

Moreover, it is wrong for South Carolina to claim that the Fourth Circuit "failed to consider" the analysis in *Henderson*. Cert. Pet. 13. Judge Michael's opinion noted that Plaintiffs "also allege as an injury their inability to obtain a "pro-choice" license plate, but this does not entitle them to standing." Pet. App. 36a. Thus, the Fourth Circuit essentially agreed with the Fifth Circuit on whether this characterization of injury conferred standing. The Fourth Circuit simply concluded that, since Plaintiffs had also alleged discriminatory treatment, "the sounder approach is to recognize discriminatory treatment as the actual injury," Pet. App. 36a, and find standing on that basis.

Both circuits stated the proper standing test. They reached different conclusions as a result of the different injuries alleged by the different plaintiffs. To the extent that this is a conflict, it is a limited conflict that does not merit review by this Court. South Carolina certainly overstates its case when it contends that this "conflict is important because there now is a dispute among the circuits regarding the constitutional minimum requirements for standing." Cert. Pet. 9-10.

No less importantly, any such conflict is merely academic because, at the Fifth Circuit's instigation, the litigation in Louisiana has proceeded. After this Court denied the *Henderson* plaintiff's petition for writ of certiorari, the Fifth Circuit issued an order permitting the matter to proceed if the plaintiff amended her complaint to challenge Louisiana's overall policy and practice of issuing specialty license plates. *Henderson v. Stalder*, No. 00-31171, 2003 WL 151183 (5th Cir. Jan. 9, 2003). The plaintiff amended her complaint, and the district court accordingly ruled that the plaintiff had standing

and struck Lousiana's policy and practice of issuing specialty plates, including the statute that authorized the "Choose Life" plate. *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D. La. 2003). That matter is currently on appeal. *Henderson v. Stalder*, No. 03-30699 (5th Cir. filed Jul. 23, 2003). Because that matter has proceeded despite the Fifth Circuit's initial dismissal of the case for lack of standing, any conflict between the circuits has no real significance, and this Court should decline to grant certiorari.

Finally, South Carolina is certainly mistaken about this matter's importance when it contends that it "involves the question whether a person has standing to challenge a legislative enactment without making any substantial effort to seek expression of their opposing viewpoint." Cert. Pet. 16. There is no such question in this case because Plaintiffs *did* seek to express their opposing viewpoint by appealing to the legislature for a "pro-choice" plate. At a legislative committee hearing, Planned Parenthood sought to amend a "Choose Life" bill to include authorization of a "pro-choice" plate. Pet. App. 31a.[9] Thus, this is not a case about a "single individual" who seeks to halt a license plate "merely upon an allegation that they have not been provided with the opportunity to express an opposing viewpoint." Cert. Pet. 17.

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[9] Judge Shedd was again in error when he stated in his opinion dissenting from the denial of rehearing that "no . . . effort was made in this case" to obtain enactment of a statute authorizing "pro-choice" specialty license plates. Pet. App. 11a n.3. South Carolina contends that Plaintiffs' effort was "insufficient." Cert. Pet. 16. However, imposing a requirement about "how far" a party must pursue a legislative proposal in order to clear the standing threshold in these circumstances would enmesh the courts in impossible line-drawing. It is clear that Plaintiffs sought a specialty plate and that their efforts were rebuffed.

There is no conflict between the Fourth and Eleventh Circuits on the standing question. Nor is there any conflict between the Fourth and the Fifth Circuits. To the extent that there is any disagreement between the Fourth and Fifth Circuits, it is limited and indirect, and certainly does not give rise to a conflict on an "important matter" as this Court's rules require.

II. THE FOURTH CIRCUIT'S DECISION ON THE SUBSTANTIVE ISSUE IN THE LITIGATION IS NOT AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT; NOR IS THERE ANY CONFLICT AMONG THE CIRCUITS.

South Carolina mischaracterizes the holding of the Fourth Circuit. The Fourth Circuit did not hold that, when government is speaking, it must "affirmatively provide for the expression of opposing viewpoints." Cert. Pet. 11. It found that, in this particular license plate situation, the plate was both private speech and government speech. Pet. App. 45a. It also found that the nature of the medium was more like a "forum" than like a "government program." Pet. App. 48a-54a. For these reasons—the significant element of private speech, and the "forum" nature of the medium—the Fourth Circuit concluded that South Carolina could not discriminate on the basis of viewpoint in terms of authorizing one message while refusing to authorize another.

South Carolina does not dispute that the refusal to authorize a "pro-choice" license plate is viewpoint discriminatory. Nor does South Carolina dispute the Fourth Circuit's conclusion that, where the speech includes a significant component of private speech, government may not engage in viewpoint discrimination. Rather, South Carolina challenges the Fourth Circuit's conclu-

sion that the speech is not simply government speech, but involves a significant component of private speech. Cert. Pet. 23.

This is not an important federal question meriting certiorari.

Indeed, South Carolina's argument is essentially that a properly stated rule of law was misapplied. South Carolina does not challenge the application of the four-factor test used by the Fourth Circuit. Instead, South Carolina disagrees with the Fourth Circuit's conclusion that the third factor (identity of the literal speaker) and fourth factor (identity of who is ultimately responsible for the message on the plate) of that test "weigh in favor of finding private speech." Pet. App. 45a. This is not a basis for certiorari. S.Ct. Rule 10.

South Carolina attempts to rest its argument on *Rust v. Sullivan*, 500 U.S. 173 (1991). Cert. Pet. 21-22. However, as Judge Michael's opinion explains, *Rust* involved a program created and funded by the government to accomplish a particular purpose, where the government enlisted private citizens to carry out the program. Under those circumstances, where the government creates a program through which it speaks, the government may prescribe the message and impose viewpoint and content limitations on it. Pet. App. 50a.

As Judge Michael found, those are not the circumstances here. Pet. App. 54a. Here, there is no program established with government funds.[10] More importantly, when citizens display the "Choose Life" plates, they will not be speaking as and for the government program, they

[10] The only funds will be those of the citizens who choose to display the message on the Choose Life plate, and even if the "crisis pregnancy services" are a program, there will be no program unless a minimum number of citizens choose to purchase the plates.

will be speaking for themselves. "When a special license plate is purchased, it is really the private citizen who engages the government to publish his message, not the government who engages the private individual to publish its message . . . ." *Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing *en banc*).

Thus, South Carolina's claim that the panel's judgment threatens the government's ability to express its viewpoint in "countless other programs" is hyperbole that rests on a mischaracterization of what the Fourth Circuit found.[11] The Fourth Circuit did not, as South Carolina argues, depart from the settled law that government may favor one viewpoint when it speaks. Rather, the Fourth Circuit concluded that the speech was not government speech, but was both government speech and private speech. Then, by looking at the nature of the license plate medium, the Fourth Circuit concluded that when this mixed speech occurred in a forum opened by South Carolina rather than in a "program" created and funded by South Carolina, South Carolina could not dis-

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[11] South Carolina's claim that the Fourth Circuit judgment "implicitly undermines the ability," Cert. Pet. 10, of several other states to issue a "Choose Life" plate is likewise overstated. Many of the states South Carolina lists have not enacted such legislation, and it is impossible to predict whether they ever will. *See* Choose Life, Inc. Resources Newsletter: States Where Choose Life Plates Have Been Approved, *at http://www.choose-life.org/newsletter.html* (last visited Dec. 20, 2004). Moreover, it is equally impossible to predict, even if legislation were to be enacted in those states, whether any of the legislatures would refuse to issue a "pro-choice" plate. Many of the remaining states on South Carolina's list authorized "Choose Life" plates following a formal administrative process which, presumably, is open to (and, in some states, has successfully been pursued by) parties interested in obtaining authorization for a "pro-choice" plate.

criminate on the basis of viewpoint in allowing access to the forum.

There is nothing in the Fourth Circuit's conclusion that the "Choose Life" plates involve private speech that would undermine holdings that flying the flag in a national cemetery, *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), and an anti-tobacco advertising campaign that identifies itself as sponsored by the state, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp.2d 1085 (Cal. Ct. App. 2003), are government speech.[12] Neither involved the significant role of private speech found here, and neither involved the opening of a forum. Therefore, there is no reason for concern that the Fourth Circuit's holding has any bearing on the right of government to control its message when it speaks.

Furthermore, there is no conflict in the federal courts with the Fourth Circuit's ruling that South Carolina engaged in impermissible viewpoint discrimination by authorizing only the "Choose Life" plate. In issuing the decision below, the Fourth Circuit is the first and only federal appellate court to rule on the constitutionality of a statute authorizing a "Choose Life" license plate. Not only are there no other federal appellate court decisions on this issue—conflicting or otherwise—but the few federal district courts that have ruled on the constitutionality of "Choose Life" license plate statutes have also invalidated them as viewpoint discriminatory. *ACLU v. Bredesen*, No. 03-1046, slip. op. at 4-5 (M.D. Tenn. Sept. 24, 2004); *Henderson v. Stalder*, 112 F. Supp. 2d 589, 599 (E.D. La. 2000), *rev'd on other grounds*, 287 F.3d 374 (2002), *on remand*, 265 F. Supp. 2d 699 (E.D. La. 2003).

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[12] South Carolina's analogy to *Griffin* would be more apt had the issue there been whether the government could limit display of the Confederate flag on individual graves—but, as the *Griffin* court noted, such display was in fact permitted.

Similarly, every federal court that has considered whether individually chosen license plates containing messages or emblems are private or government speech has determined that such plates are private speech, or a mixture of private and government speech. No federal court has adopted the argument, made by South Carolina, that such plates are exclusively government speech. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) (finding *SCV*'s specialty license plates constitute private speech); *Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001) (analyzing restriction on vanity plates as a "government regulation[ ] . . . concerning *private individuals' speech* on government-owned property") (emphasis added); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (analyzing a restriction on vanity plates as a restriction on private individuals' speech); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1101-02 (D. Md. 1997) (finding that specialty plates constitute private speech); *The Women's Res. Network v. Gourley*, 305 F. Supp. 2d 1145, 1156 (E.D. Cal. 2004) (specialty plates constitute both private and government speech).[13]

The panel's judgment is also fully in accord with this Court's decision in *Wooley v. Maynard*, 430 U.S.

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[13] The best South Carolina can muster to suggest disagreement among the lower courts on this issue is reference to an intermediate appellate court decision from Oregon that held that custom configuration of the required letters and numbers on a license plate was government speech. Cert. Pet. 24, *citing Higgins v. Driver and Motor Vehicle Servs. Branch*, 13 P.3d 531, 547-48 (Or. Ct. App. 2000). However, the Oregon Supreme Court disagreed with that conclusion, and held that the configuration of the letters and numbers was neither government speech, nor private speech, but rather "the compelled public disclosure of the registration status of the vehicle." *Higgins v. Driver and Motor Vehicle Servs. Branch*, 72 P.3d 628, 632 (Or. 2003).

705 (1977), where this Court recognized that even messages on standard license plates are associated at least partly with the vehicle owner. Indeed, as Judge Michael observed, the role of the private individual here is considerably greater than in *Wooley*: "Although a specialty license plate, like a standard plate, is state-owned and bears a state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint." Pet. App. 44a. Moreover, without the actions of the private individuals who meet the pre-production requirement of 400 prepaid applications or $4,000, and who pay for and display these plates on their private vehicles, the plates would not even exist. *See Sons of Confederate Veterans, Inc.*, 305 F.3d at 246 (Luttig, J., respecting denial of rehearing *en banc*).

The ruling of the Fourth Circuit that South Carolina cannot engage in viewpoint discrimination in approving specialty license plates is not an important federal question, and there is no conflict in the federal courts with the Fourth Circuit's conclusion.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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